TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]23

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

[illegible]AM T. SILER, LAWRENCE B. FINN, AND LEW P. [illegible]ARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED FEBRUARY 15, 1911.

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(22,526.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 905.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

ADAM T. SILER, LAWRENCE B. FINN, AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Record of the Proceedings of the Circuit Court of the United States within and for the Eastern District of Kentucky, Sitting at Frankfort, in the Cause and Matter Hereinafter Stated, and the Same Being Disposed of at a Regular Term of said Court Begun and Held at the City of Frankfort, in said District, on the Fourth Monday in September, Being the 26th Day of said Month, A. D. 1910, to wit, on the 12th Day of January, A. D. 1911.

Present: Hon. John W. Warrington, circuit judge, specially designated to sit in this case, and Hon. Arthur C. Denison, district judge, and Hon. Edward T. Sanford, district judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky.

2 Said action was commenced on the 7th day of September, A. D., 1910, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

On the 7th day of September, A. D., 1910, bill of complaint was filed in said cause, which said bill is in words and figures as follows, viz:—

3 In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
versus
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky:

The Complainant, the Louisville and Nashville Railroad Company, brings this, its Bill of Complaint, against Adam T. Siler,

Lawrence B. Finn, and Lew P. Tarlton, who compose what is known as the Railroad Commission of Kentucky, and thereupon your Complainant says:

I.

That it is a corporation duly created, chartered, organized and existing under the laws of the State of Kentucky, having its principal office and place of business in the City of Louisville, County of Jefferson, State of Kentucky; that it is a citizen and resident of said State, and by virtue of its charter and the amendments thereto it has and had at the dates hereinafter mentioned power to sue and be sued, to contract and be contracted with, and to construct, own, lease, control, maintain and operate steam railroads in the State of Kentucky and in other States as a common carrier of intrastate and interstate freight and passengers; and that the amount in controversy in this cause exceeds the sum or value of Two Thousand Dollars, exclusive of interest or costs.

II.

That the defendants, Adam T. Siler, Lawrence B. Finn, and L. P. Tarlton, are, and each of them is, a citizen and resident of the State of Kentucky, and the said defendants are the duly
4 elected, qualified and acting members of and do constitute the Railroad Commission of the State of Kentucky, the principal office of which Commission is fixed by law at Frankfort, the seat of government of said State, which is in the Eastern District of Kentucky whereof the defendants as constituting said Commission are all inhabitants.

III.

Your complainant was incorporated and organized under an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to Charter the Louisville and Nashville Railroad Company," approved March 5, 1850, whereby complainant was authorized to construct and operate a railroad from Louisville, Kentucky, to the State Line in the direction of Nashville, Tennessee. Thereafter said charter was amended by an Act of said General Assembly, approved March 20, 1851, and by its said charter, thus amended, complainant was authorized to construct and operate a branch of its railroad to the Mississippi River and any other branches it might desire. Again, its charter was amended by Act of said General Asembly, approved January 17, 1856, and by its charter, as thus amended, complainant was authorized to purchase and hold any railroad constructed by any other railroad company. This said charter was amended by divers other Acts of said General Assembly, and by virtue of said charter, as thus amended, and upon the faith thereof, complainant has constructed branches and acquired and now owns, holds and operates, among others, the following railroads within the State of Kentucky, namely: The Cincinnati Division, from Louisville to Newport, 113.83 miles in length, also extends from Newport to Cincinnati, O.;

The Kentucky Central Division, from Sinks to Covington, 149.88 miles long, also extends from Covington to Cincinnati, Ohio;

The Richmond Branch, from a point near Richmond on the Kentucky Central Divison, to Rowland, a distance of 30.43 miles:

The Main Stem from Louisville to the Tennessee State Line, a distance of 139.88 miles;

5 The Bardstown and Springfield Branch, from Bardstown Junction on the Main Stem to Springfield, via Bardstown, a distance of 37.44 miles;

The Knoxville Branch, from Lebanon Junction, on the Main Stem, to the Tennessee State Line at Jellico, a distance of 171.17 miles:

The Lexington Branch, from La Grange, on the Cincinnati Division, to Lexington, a distance of 67.00 miles.

The destination- mentioned in this complaint and in the exhibit hereto attached are located on respective divisions of the Company, as follows:

On the Bardstown and Springfield Branch:
Bardstown,
Chapeze,
Clermont,
Deatsville,
Early Times,
Greenbrier,
Hobbs,
Samuels;

On the Knoxville Branch:
Chicago,
Coon Hollow,
Gethsemane,
Lebanon,
Loretto,
St. Mary's;

On the Richmond Branch:
Silver Creek;

On the Lexington Branch:
Eminence.

IV.

Complainant states that by section two hundred and nine (209) of the Constitution of the State of Kentucky, adopted September 28, 1891, the Railroad Commission of that State was established and provided for as follows:

"A commission is hereby established, to be known as 'The Railroad Commission' which shall be composed of three Commissioners. During the session of the General Assembly which convenes in December, eighteen hundred and ninety-one, and before the

6 first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three Commissioners, one from each Superior Court District as now established, and said appointees shall take their

office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall continue in office during the term of the present Governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may from time to time change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in any wise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulared by law; and until otherwise provided by law the commission so created shall have the same
7 powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners? The General Assembly may, for cause, address any of said Commissioners out of office by similar proceedings as in the case of Judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor."

Complainant states that said Railroad Commission on or prior to September 28, 1891, the date the present Constitution of the State of Kentucky was adopted and went into effect, had not been empowered by any then existing constitutional or statutory provision to regulate or to fix the rate, toll or compensation, which a railroad company or corporation might charge, collect or receive for the service of transporting freight or passengers over its line or lines of railroad in that State, nor was there any attempt made by the General Assembly of the State of Kentucky afterward to confer such power upon said Commission until March 10, 1900, when said General Assembly attempted to grant such power to said Commission by enacting what is commonly called the "McChord Act," which, including its title, as follows:

"An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference therto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

8 "Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order and on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed
9 by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars;

"2. The Circuit Court of any County into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall

have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

"3. Prosecutions under this act shall be by indictment.

"4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

Approved March 10, 1900."

By this act the said General Assembly undertook to authorize said Railroad Commission when complaint shall be made
10 to it, or when it receives information, or has reason to believe that any railroad company or corporation is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in the State of Kentucky, to perform judicial functions, that is to say, to hear and determine the matter as speedily as possible, having first given ten days' notice to the company or corporation complained of by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing, also the nature of the complaint or matter to be investigated; and the said General Assembly by the act aforesaid attempted to confer the judicial power upon said Commission to hear such statement, arguments or evidence offered by the parties as the Commission may deem relevant; and, should said Commission determine, in the exercise of the powers of a court sought to be thus granted to it, that the company or corporation is, or has been, guilty of extortion, the said General Assembly undertook to grant or delegate to said Commission legislative power, and to impose on it the duty to make and fix, without further notice or investigation, a just and reasonable rate, toll or compensation which such railroad company or corporation may charge, collect or receive for like services thereafter rendered. According to the provisions of said act the rate, toll or compensation so fixed by said Commission shall be entered and be an order on the record book of its office, and be in full force and effect at the expiration of ten days after said Commission shall have mailed a copy of the order fixing the same to any officer, agent or employé of the company or corporation affected thereby; and said act further provides that such order of said Commission may be at any time, without further notice, evidence or investigation, revoked or modified by an order of said Commission likewise entered of record.

It is further provided by said act that should such railroad company or corporation, of any officer, agent or employé thereof, charge,

collect or receive a greater or higher rate; toll or compensation for like services thereafter rendered than that made and fixed
11 by said Commission, as aforesaid, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense in any sum not less than five hundred ($500) dollars, nor more than one thousand ($1000) dollars, and, upon a second conviction, in any sum not less than one thousand (1000) dollars, nor more than two thousand ($2000) dollars, and for a third and succeeding convictions, in any sum not less than two thousand ($2000) dollars, nor more than five thousand ($5000) dollars.

The said act further provides that the Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

V.

By the provisions of Section 819, Kentucky Statutes, which is Section 226 of an act entitled, "An Act providing for the creation and regulation of private corporations," which became a law April 5, 1893, the offenses of extortion and unjust discrimination by a railroad company or corporation are required to be prosecuted by indictment or action in the name of the Commonwealth of Kentucky, upon information filed by the Railroad Commissions, and such indictments shall be made only upon the recommendation or request of the Railroad Commission filed in the court having jurisdiction of the offense. This section is in substance the same as section four (4) of the act of the General Assembly of the State of Kentucky, approved April 6, 1882, entitled, "An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations and in aid of that purpose to establish a board of Railroad Commissioners and define its
12 powers and duties," set forth in the General Statutes of Kentucky, edition of 1888, page 1023. The said act of March 10, 1900, known as the McChord Act, does not appear to have been intended to change the settled legislative policy that indictments for such offenses should be found on the recommendation of the Railroad Commission, and the duty of enforcing any orders making and fixing a railroad rate under the provisions of the last mentioned act rests on the defendants constituting the said Railroad Commission.

VI.

The Constitution of the State of Kentucky, which is now and has been since September 28, 1891, in full force and effect, contains these provisions:

"SEC. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"SEC. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Said State Constitution also provides as follows:

"SEC. 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"SEC. 135. No courts, save those provided for in this Constitution, shall be established."

The said Railroad Commission is not a court established by said Constitution, nor is it by any provision thereof vested with any judicial or legislative powers or functions whatever concerning rates or otherwise, nor is the General Assembly thereby
13 authorized to legislate upon, regulate or fix such rates for the transportation of freight or passengers, or to grant or delegate any judicial or legislative powers to said Commission to regulate or fix railroad rates for the transportation of freight or passengers within the State of Kentucky. But, notwithstanding said provisions of the present Constitution of the State of Kentucky, the General Assembly, in violation thereof, by said McChord Act of March 10, 1900, attempted to grant and delegate to and combine in said Railroad Commission all three of the fundamental powers of said State government or of a government republican in form, viz: Those which are legislative; those which are executive; and those which are judicial; so that said Commission is an anomalous and unconstitutional body, which, with respect to all proceedings or investigations before it concerning the rates charged, collected or received by railroad carriers of intrastate freight and passengers, occupies the attitude of complainant, judge, legislator and prosecutor. It may itself be the complainant, or may act as the complainant's attorney; as judge, it may try all preliminary questions and pass on the guilt or innocence of the carrier accused of extortion; as legislator, it may make and fix the compensation of the carrier found by it guilty of extortion for like services thereafter rendered; as informer, it may procure indictments by the Grand Jury for the disobedience of its legislative acts; and as prosecutor, it may recover in behalf of the State from the carrier thus indicted the penalties imposed by said act for such disobedience.

No appeal to any court or tribunal possessing judicial powers is allowed or provided for by said McChord Act, or any other statute of the State of Kentucky, in behalf of the railroad carrier, from any order of said Commission adjudging it guilty of extortion, or

from any order of said Commission making and fixing what it shall have determined to be a just and reasonable rate, toll or compensation, which such railroad carrier may charge, collect or receive for like services thereafter rendered, in lieu of the rate, toll
14 or compensation held by said Commission to be extortionate.

A judicial investigation or judicial review of the question of the reasonableness of the existing rate, toll or compensation being charged, collected or received by a railroad carrier, or of the accusation of extortion, is not allowed or provided for by said McChord Act or any statute of the State of Kentucky. The order or judgment of said Commission adjudging that an existing rate of any railroad carrier operating a line of road in the State of Kentucky for the transportation of intrastate freight or passengers is extortionate, or that such carrier is guilty of extortion, is final and conclusive, or intended so to be, by any fair or reasonable construction of said act; and in any prosecution by indictment in the Circuit Court, having criminal jurisdiction to recover the penalties imposed by said act for disregarding such order or judgment of said Commission, or for charging, collecting or receiving a higher or greater rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, neither the carrier, its officer, agent or employé, indicted for the alleged offense of extortion, is allowed by the terms of provisions of said McChord Act, or any statute of the State of Kentucky, to make or establish by evidence the defense that the existing rate charged, collected or received is just and reasonable, or that the rate made and fixed by said Commission is not just and reasonable.

Furthermore, were such a defense allowed, the issue raised thereby could not be, in the nature of the case, tried by a jury or a court of criminal jurisdiction. Besides, different juries or courts, were such a defense permitted, might reach different conclusions on the same or similar testimony as to whether the offense of extortion had been committed; and the criminality of the act of the carrier or its officer, agent or employé indicted would depend on the view of the jury or court of the reasonableness of the rate charged, collected or received, and the question of reasonableness would depend on many uncertain and complicated elements.

15 Complainant states that the rate, toll or compensation made and fixed by said Commission as, in its opinion, a just and reasonable one for certain services in the transportation of intrastate freight or passengers, to be thereafter followed or observed by the carrier, is by any fair or reasonable construction of said McChord Act, not simply advisory nor merely prima facie just and reasonable, but final and conclusive as to what is a just and reasonable rate, toll or compensation for the services of the carrier, as prescribed by said Commission, for like services thereafter rendered, and said act neither contemplates nor allows any issue to be made or inquiry to be had as to the justness or reasonableness in fact of any rate, toll or compensation made and fixed by said Commission, which, under the provisions of said act, is the only one that is lawful, and, in contemplation of law, the only one that is just

and reasonable, and in any proceeding under said act to enforce the final order or ruling of said Commission, in these respects, by the recovery of the fines and penalties imposed thereby or otherwise, there is no fact left to be traversed or reviewed by the court or jury, except the fact of the alleged violation of said act in not complying with such final order or ruling of said Commission.

Complainant states that said McChord Act is violative of the sections of the State Constitution of Kentucky hereinabove referred to, and is, therefore, void.

Complainant further states that said McChord Act is not only unconstitutional and void as violative of the Constitution of the State of Kentucky, but it constitutes as abandonment by said State of a republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and is, therefore, void.

16 The said act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions of the Constitution of the State of Kentucky, is and can be at most only an administrative body or tribunal, and is not and cannot be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Furthermore, complainant states that said McChord Act, in so far as it attempts to clothe said Railroad Commission with legislative, executive and judicial powers of an arbitrary nature over the property of railroad carriers and the use thereof, is an act by the State of Kentucky, the enforcement of which operates to deprive such carriers of their property without due process of law, and to deny such carriers the equal protection of the laws, and said act is, therefore, unconstitutional and void, being in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant further states that said McChord Act has not been construed in any case by the Court of Appeals, the highest

17 court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Con-

stitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdicion, either State or Federal

VIII.

Complainant further states that in its effort to prevent any judicial inquiry as to the validity of said McChord Act the General Assembly of the State of Kentucky burdened with excessive, extreme and cumulative fines and penalties any challenge thereof in the courts so that the carrier or party affected thereby is necessarily constrained to submit to an unjust and unreasonably low rate made and fixed by said Commission for its services in transporting intrastate freight or passengers, rather than take the chances of the fines and penalties imposed for a refusal or failure to comply with said Commission's final order making and fixing such rate, and thus such carriers are deprived by the State of Kentucky, through the operation of said act, of the equal protection of the laws in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States

Furthermore, the provisions of said McChord Act which have been hereinabove referred to, in prescribing a fine of not less than Five Hundred Dollars nor more than One Thousand Dollars for the first offense of extortion, as therein defined, and a fine of not less than One Thousand Dollars nor more than Two Thousand Dollars for the second offense, and a fine of not less than Two Thousand Dollars nor more than Five Thousand Dollars for the third offense in each case against a railroad company or corporation of any officer, agent or employé thereof, charging, collecting or receiving a greater or higher rate, toll or compensation or like services that may be rendered after the order of the Commission thereon than that made and fixed by said Commission, do impose upon such railroad company or corporation and upon such officer, agent or employé thereof, the burden of obtaining a judicial decision of the question of the
18 reasonableness and justness of the rate or rates, toll or compensation so charged, collected or received, only upon the condition that if unsuccessful such railroad company or corporation or such officer, agent, or employé thereof must pay fines as provided in said McChord Act, as hereinabove set forth, and thus the provisions of said McChord Act do close up all approaches to the courts and do thus prevent any hearing upon the question whether the rate or rates, charges or compensation, as provided in said Act and as made and fixed by said Commission, are not too low and, therefore, invalid, and complainant says that said fines and penalties imposed and made cumulative by said McChord Act are excessive within the meaning and intent and in violation of Section 17 of the State Constitution of Kentucky and they are unconstitutional on their face without regard to the question of the justness or reasonableness of the rates that may be made or fixed by said Commission, and are, therefore, in violation of the provisions of Article XIV of the Amendments to the Constitution of the United States, and said McChord Act is therefore unconstitutional and void.

IX.

Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and cannot afford a judicial hearing or determination of such questions brought before it; and, whereas, all other common carriers, in the event of a
19 judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the provisions of said act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rate taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said act, required to make and fix what it may think is a just and reasonable rate, toll, or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered and if such railroad carrier fails or refuses to comply with the rate made and fixed by said Commission it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply, to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said act, and thus such railroad carrier is deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant states that said McChord Act relates to and affects all freight and passenger rates charged, collected or received by railroad carriers in the State of Kentucky, and is not restricted to rates actually charged, collected or received within said State for the transportation of traffic, having its origin and destination in said State, and by its terms and provisions said act is an express and direct interference with and regulation of interstate commerce, and in conflict with sub-section three (3), section eight (8), of article one (1) of the Constitution of the United States, which vests in the Congress of the United States the exclusive power to regulate commerce
20 among the several States, which power the Congress has exercised by An Act to regulate commerce" approved February

4, 1887, and the amendments thereto, and said McChord Act is, therefore, unconstitutional and void.

XL.

Complainant further states that heretofore, to wit, on the 30th day of May, 1910, the Greenbrier Distillery Company and numerous other corporations acting in concert with said Distillery Company, each of which claimed and purported to be a corporation duly incorporated and empowered under the laws of the State of Kentucky to engage in the distillery business, that is to say, in the manufacture, storage, preparation for market, and sale of whiskey and other distillery products, and in shipping same to and from their respective plants filed their joint petition as plaintiffs with the Railroad Commission of Kentucky against this complainant, and therein said Greenbrier Distillery Company and its co-plaintiffs alleged that their respective plants were located upon the lines and at certain named stations of defendant in said complaint, the Louisville and Nashville Railroad Company, complainant herein, which are in a previous paragraph hereof specially set forth, and that, in order to carry on and to operate their respective distilleries, it was, in said petition, alleged to be necessary for each of said plaintiffs to cause to be transported over defendant's lines from various points in Kentucky set forth in Exhibit A filed with said petition to their respective plants various commodities alleged to be necessarily used by said plaintiffs in the manufacture and preparation of whiskey and other distillery products for the markets.

In said petition, said plaintiffs did set forth in Exhibit A made part thereof the rates therein complained of and the commodities upon which the same were then assessed, as well what purported to be former rates as the points of origin and of destination, and plaintiff did further therein allege that, for many years prior to the 25th day of March, 1910, defendant had transported over its line or lines of railroad to and from points wholly within the State of
21 Kentucky the various commodities shown in said Exhibit and that it had charged, collected, and received from the plaintiffs during said time the rates printed therein from said points of origin to their said respective plants, and it was further therein alleged that on the 15th day of March, 1910, defendant issued its circular 2910 cancelling each and all of said printed rates shown in said Exhibit, and that in lieu thereof to be effective March 25th, 1910, defendant had substituted the designated new rates, which were shown by figures inserted in said Exhibit in red ink, and that for the transportation of all said commodities to and from the points shown in said Exhibit, this defendant had ever since the 25th day of March, 1910, charged, collected, and received from the plaintiffs the said increased rates as aforesaid, and still charges, collects, and receives from the plaintiffs the said increased rates as aforesaid.

It was further alleged by said plaintiffs, in said petition, that each and all of said increased rates so charged, collected, and received, from said points of origin to the respective plants of each of the

plaintiffs, as shown in said Exhibit so far as the same are therein shown to be in excess of said former rates, were extortionate, unjust, and unreasonable, and it was alleged that defendant as aforesaid had induced plaintiffs and each of them to expend large sums of money in the erection of and in additions to their several plants upon the faith, as it was in said petition alleged, of said former rates, and that the defendant had maintained said rates for many years as just and reasonable rates.

And it was further alleged in said petition that all said rates charged, collected, and received by Complainant prior to March 25, 1910, were fairly remunerative, and that they were and are no
22 more than just and reasonable compensation for the transportation of said commodities to and from said points.

Plaintiffs did thereupon pray that the Railroad Commission of Kentucky would, after due notice and investigation, make and fix just and reasonable rates to and from all the points and upon all the commodities, as shown in their said Exhibit A, and that the said rates should be fixed no higher than those charged, collected, and received by defendant for the transportation of said commodities to and from said points prior to the cancellation of said former rates, which was effective March 25, 1910, and they prayed further for all necessary orders in the premises.

It was also in said petition set forth by said plaintiffs, in the second paragraph thereof, that inasmuch as defendant had continuously since the 25th day of March, 1910, charged, collected, and received from plaintiffs and was continuing so to charge, collect, and receive from them the increased rates shown in their said Exhibit A aforementioned, said defendant was, as said plaintiffs alleged, to the extent of the difference between said former rates and the existing rates then in effect, as set out in said first paragraph and in said Exhibit A, charging, collecting, and receiving from plaintiffs and each of them extortionate, unjust, and unreasonable rates for the transportation of commodities named in said Exhibit A and the several Exhibits thereafter to be filed by plaintiffs, but which, in fact, were never filed,—which Exhibits, it was therein stated, would show the amount of such alleged extortionate charges and collections made from each of the plaintiffs to the dates therein respectively stated, and plaintiffs did allege that the plaintiff, Greenbrier Distillery Company, was entitled to recover the sum of Five Hundred and Thirty-two and 62-100 Dollars, ($532.62); the plaintiff T. W. Samuels Distillery Company, the sum of One Hundred and Twenty-three and 48-100 Dollars, ($123.48); the plaintiff Early Times Distillery Company, the sum of Four Hundred
23 and Eight and 51-100 Dollars, ($408.51); the plaintiff Mueller, Wathen & Kobert, the sum of Four Hundred Dollars and 77-100, ($400.77); the plaintiff Tom Moore Distillery Company, the sum of Forty-four and 51-100 Dollars, ($44.51); the plaintiff W. B. Samuels & Company, the sum of Forty-eight and 81-100 Dollars, (48.81); the plaintiff M. C. Beam & Company, the sum of Fifty-seven and 42-100 Dollars, ($57.42); the plaintiff Old

Gran Dad Distilling Company, the sum of Two Hundred and Thirty-one and 58-100 Dollars, ($231.58); plaintiff Head and Parker, the sum of Forty-four and 80-100 Dollars, ($44.80); the plaintiff Wright & Taylor, the sum of Two Hundred and Fifty-seven and 50-100 Dollars, ($257.50); the plaintiff Clear Springs Distilling Company, the sum of Four Hundred and Eighty-one and 89-100 Dollars, ($481.89); the plaintiff S. Grabfelder & Company, the sum of Three Hundred and Twenty-five and 78-100 Dollars, ($325.78); the plaintiff Taylor & Williams, the sum of Two Hundred and Thirty-seven and 19-100 Dollars, ($237.19); the plaintiff Willow Springs Distilling Company, the sum of Three Hundred and Twenty-one and 62-100 Dollars, (321.62); and plaintiff Blair, Osborne & Ballard Distillery Company, the sum of Forty-two and 96-100 Dollars ($42.96).

And plaintiffs thus prayed that reparation be awarded to each of them for the amounts stated to be severally due, and that an award be made to each of them by the Commission for said respective sums, and plaintiffs did pray for all other and necessary orders and proceedings to which they might be entitled in the premises.

And complainant, being defendant in said proceeding, did move to strike from the petition of plaintiffs all matters relating to reparation, on the ground that the Railroad Commission of Kentucky had no authority to grant same.

Thereafter, Complainant, without waiving any question of law or procedure, filed its Answer in said proceeding traversing every affirmative allegation and material averment of said petition, and prayed that the same should be dismissed.

24 Afterwards, the defendants set the matter for hearing and on the 24th day of June, A. D. 1910, plaintiffs in said proceeding introduced a number of witnesses, and defendant, (being this Complainant), introduced a number of witnesses, but although the witnesses introduced by the plaintiffs, Greenbrier Distillery Company, and others, did testify to the rates on grain and distillery supplies on the lines of railroad of Complainant to points of destination thereon, to-wit, the distilleries of plaintiffs, respectively, and did further testify to the rates charged, collected, and received by Complainant for the transportation of said commodities to such points of destination both prior to March 25, 1910, and subsequent to said date, and, furthermore, though some of said witnesses did testify that they did, at the time of making considerable betterments and improvements on or about their respective distillery plants at such several points of destination, all within the State of Kentucky, suppose that the rates of this Complainant for the transportation of such commodities from the City of Louisville, Kentucky, to such points of destination within the State of Kentucky, would continue in force and effect, there was no testimony by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that became effective on the lines of railroad of Complainant on March 25, 1910, and that have been charged, collected, and received by it for such service of transportation on the

commodities named on and subsequent to said date, and no evidence was adduced in said proceedings that established or that tended to establish the unjust or unreasonable nature of said rates or of any of them or that said rates or any of them were or are extortionate; and no evidence was adduced that showed or tended to show that defendant, Louisville and Nashville Railroad Company, had induced any of the plaintiffs to expend large or any sums of money in the erection of or in additions to their several plants upon the faith of said former rates or of any of them.

25 But the evidence did show, and it is a fact, that on and for a number of years prior to the 25th day of March, A. D., 1910, this Complainant did have in effect upon its lines of railroad from the points of origin aforesaid to said points of destination rates of transportation covering supplies for distilleries that were established and effective alone for the benefit of owners of distilleries located at said last-named points and with a purpose to encourage the manufacture of whiskey at said points on the lines of railroad of Complainant, and it was shown by the evidence at said hearing, and it is a fact, that said rates, (all of which were contained in the tariffs of Complainant), did not apply to shipments of said supplies from the same points of origin to the same points of destination when said supplies were intended for other uses than those of the distilleries, but, on the contrary, in such cases, the rates that were contained in its tariffs and were, in fact, charged, collected, and received as aforesaid for like supplies when intended for distillery use. And a comparative statement of the rates applicable when the supplies were not to be used at distilleries is written in red ink upon the tabular statement, of which all else is in black ink, filed as part hereof marked Exhibit D.

That at all such times, said rates, applicable when the supplies were not for the use of distilleries, were the same rates which, under the tariff effective March 25, 1910, were made applicable also to said supplies when for such use; in other words, the difference in the rates based upon the intended uses of the supplies was abolished, but the rates made effective March 25, 1910, as aforesaid, were and are reasonable and just.

Nevertheless, the defendants, the Railroad Commission of Kentucky, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, did, on August 10, 1910, pass an order to the effect that the rates then charged, collected, and received by defendant, (being Complainant herein), for the transportation of the commodities to and

26 from the points thereinafter, (and herein below), named were extortionate, unjust and unreasonable, and that by charging said rates said defendant, (being Complainant herein), was and had been guilty of extortion, and said defendant Louisville and Nashville Railroad Company, (being Complainant herein), was then and there by said written Order forbidden to charge, collect, or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:

Explanation of Abbreviations.

C. L.—Car Load. L. C. L.—Less Car Load. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

Rates in Cents Per Hundred Pounds Unless Otherwise Specified.

To—	From	Bbl.–box material, K. D.; min. wt., 30,000 lbs.		Bbls., empty; minimum, 120 bbls., per bbl.	Bots. caps, metal, any quantity.	Bots. covs., paper or straw, packed or pressed in bales; min. wt., 15,000 lbs.		Botts., comm., packed or released; min. wt., 24,000 lbs.		Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop; min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington (prop.), Ky. Newport (prop.)	11	23	14	43	23	29	25	31½	28	10	..
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Chapeze,	Louisville, Ky.	5	13	9	20	13	15	10	15	13	5	8
Chicago,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Clermont,	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	..
Coon Hollow,	Covington, Ky. Newport, Ky.	12	20½	14	37½	20½	33	23½	28½	21½	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Deatsville,	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Early Times,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Gethsemane,	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12½
Greenbrier,	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	..
Hobbs,	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	..
Lebanon,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Loretto,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
St. Mary's	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Samuels,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Silver Creek,	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	..
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	..
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	..
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

27 And said Railroad Commission did thereupon declare that the foregoing rates so by it fixed for the transportation of said commodities from and to said points were just and reasonable.

And Complainant states that, without having heard any evidence whatsoever relative to the amount of money claimed by any of the plaintiffs in this proceeding as a refund on account of payment by them respectively to Complainant between March 25, 1910, and August 10, 1910, for the transportation of said commodities or some of them, between the points of origin and the points of destination, all within the State of Kentucky, the Railroad Commission did nevertheless on said 10th day of August, 1910, pass another written Order whereby and wherein it again expressed the opinion and did order that the rates that were then charged, collected, and received by defendant, (being Complainant herein), for the transportation of said commodities to and from the points fully set out in the written Order of said Commission aforementioned, were and are extortionate, unjust, and unreasonable, and it did order that this defendant, by charging said extortionate rates, was and had been guilty of extortion, and the Commission did then find it to be a fact, without any evidence whatsoever having been presented before it in support thereof, that the Complainants, who are hereinbelow named, had paid to defendant, (being Complainant herein), the following sums in excess of just and reasonable rates for the transportation of said commodities to and from said points respectively, and that each of said Complainants hereinafter named was by said order awarded sums respectively set opposite their names, to wit:

Greenbrier Distillery Co.	$532.62
Clear Springs Distilling Co.	481.89
Early Times Distilling Co.	408.51
Mueller, Wathen & Kobert	400.77
S. Grahfelder & Co.	325.78
28 Willow Springs Distilling Co.	321.62
Wright & Taylor	321.62
Taylor & Williams	237.19
Eminence Distillery Co.	248.37
Old Gran Dad Distillery Co.	231.38
T. W. Samuels Distillery	123.42
Warwick Distilling Co.	127.74
Burks Spring Distillery Co.	145.25
W. B. Samuels & Co.	58.81
M. C. Beam & Co.	57.42
Head & Parker	44.80
Blair, Osborne & Ballard Distilling Co.	42.86
Tom Moore Distillery	44.51
Brown-Forman Company	
Bernheim Distilling Co.	
Mattingly & Moore Distillery Co.	
F. G. Walker Co.	
Charles Kobert & Co.	
Smith Distillery Co.	
R. Cummins & Co.	

And the Commission did furthermore order that each of said named complainants was entitled to recover of defendant, (being Complainant herein), the sum hereinabove respectively set opposite its name, and it was further ordered by the Commission that upon failure of defendant, (being Complainant herein), to pay to each of said complainants the sum set opposite its name respectively as hereinabove set forth, a certified copy of its said Order, finding and award, together with the evidence heard, should be filed by A. T. Siler, Chairman of said Commission, defendant herein, in the Office of the Clerk of the Circuit Court of the County having jurisdiction as provided by law, to the end that the said complainants may recover of said defendant their said respective sums.

There was no evidence introduced in said investigation or considered by said Commission showing or tending to show that
29 this Complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky or between the points of origin and of destination aforementioned were in and of themselves unjust, unreasonable, or extortionate, nor was there any evidence introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding or any of them were entitled to receive as reparation from this Complainant on account of previous payment by them or any of them of alleged unjust or unreasonable or extortionate rates.

Complainant says that the aforementioned two written opinions and orders passed by the Commission as above stated on August 10, 1910, were ordered by said Commission to be recorded upon the record books of said Commission and a certified copy of each of them was ordered to be furnished to defendant, Complainant herein. And the several rates made and fixed by the Commission as hereinabove set forth were entered as and were to be an order on the record book in the Office of said Commission and signed by the Commission, and a copy thereof was mailed by said Commission to W. G. Dearing, who is General Attorney of Complainant, and was received by said Dearing at Louisville, Kentucky, on August 31st., 1910. The original copy of said written opinion and orders mailed Complainant's General Attorney as aforesaid is filed herewith as part hereof marked Exhibit No. B. Complainant also files as part hereof, copy of petition and exhibits filed by plaintiffs Greenbrier Distillery Company, and others, and copy of Answer of defendant Louisville and Nashville Railroad Company,—all filed in said proceeding before the Commission, and marked Exhibit No. C.

Complainant further shows that said written orders of the Commission, dated August 10, 1910, which purport to make and fix rates that may be charged, collected, and received by Complainant for the transportation of the commodities therein named between the points of origin and destination,—all within the State of Kentucky,—that
are in said written Order set forth, are null and void, for the
30 additional reason that said Orders do, by their terms, purport to make and to fix rates that may be charged, collected,

and received by Complainant for the transportation of the commodities named between the points mentioned, without reference to the uses or purposes to which such commodities were to be applied by the consignees at the points of destination, and that such written Orders do, by their terms, make and fix flat rates applicable to the commodities named wholly without regard to the uses or purposes to which such commodities were to be applied by the consignees thereof, whereas, in fact and in law, the only subject-matter that was brought before the Commission for investigation by the Greenbrier Distilling Company and others in the proceeding aforementioned was the making and fixing of rates for the transportation of the commodities named in said petition to be used by the consignees, being plaintiffs in said proceeding, in their several distilleries at or near the respective points of destination in the production of whiskey and for no other use or purpose whatsoever. This Complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said Orders thereon were and are null and void.

31 XII.

Complainant states that the reduction in its said rates ordered by the Commission, if put into effect, will directly and necessarily interfere with, affect and reduce Complainant's existing rates on said commodities shipped to and from stations on its lines in Kentucky to and from stations on its lines outside of Kentucky, as the full amount of Complainant's said existing local rates in Kentucky enter into and form a part of its through rates set forth in its tariff filed with the Interstate Commission on or about March 25, 1910, and remaining on file with that Commission ever since as required by law, on such interstate shipments of freight belonging to the same classes. The said Order made by the Commission, were it to become effective, would not only reduce Complainant's said local rates in Kentucky and cause an annual loss to Complainant on intrastate freight of at least $15,600, but would directly and necessarily result in reducing Complainant's through rates on interstate shipments of such freight, and cause an annual loss to Complainant thereon of not less than $3000. Thus the total reduction in the revenues of Complainant directly resulting from the Order afore-

said, should the same be put into effect, would not be less than $18,600 per annum. Complainant states that the change in rates and charges directed by the Commission in its Order aforesaid, would necessarily result in the disturbance, alteration and reduction of interstate rates now and for a long time established on Complainant's lines, and to put into effect said Orders would be, to that extent, a direct regulation of interstate commerce and in violation of Clause Three (3), Section Eight, (8), Article One, (1) of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate interstate commerce, and this power has been exercised in the Act to amend the "Act to Regulate Commerce", approved June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, wherein the power to fix and regulate rates to be charged, collected, or received by railroad
32 carriers on interstate freight was delegated to the Interstate Commerce Commission, and since the approval of said Acts of Congress neither the State of Kentucky nor the Kentucky Railroad Commission has any power of authority to regulate or fix rates to be charged, collected, or received by railroad carriers so as to directly or indirectly regulate, disturb, interfere with or fix the rates of such carriers on interstate freight or traffic, or to impose any orders, rules, charges, or regulations, the necessary result of the enforcement of which would be to affect and regulate commerce between the State of Kentucky and other States, or conflict with the exercise of the powers delegated by the Congress to the Interstate Commerce Commission in the Act aforesaid. Complainant states that the Orders of the Commission promulgated, as it was, since the passage and approval of said Act of Congress on June 29, 1906, and the Act to Amend the Act to Regulate Commerce, approved June 18, 1910, is in conflict therewith and violates the commerce clause of the Constitution of the United States, the benefit and protection of which Complainant relies on and invokes in the premises.

XIII.

Complainant states that its existing rates and charges in effect on its several lines in the State of Kentucky and applicable to its intrastate freight business, affecting the commodities named in said order between the points of origin and points of destination herein mentioned, instead of being extortionate, are not higher than is just and reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic, or with respect to the value of the services rendered to the shippers or public generally; and complainant states it has the lawful right, as inherent to its business as a common carrier of freight and passengers, to charge and receive for the services rendered by it in the State of Kentucky just and reasonable rates, which right to charge and receive such just and reasonable rates is a prop-
33 erty right that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with; and complainant states that the Commission's orders if permitted to be put in force, will deprive it of its said property right without due

process of law in violation of section one (1) of the Fourteenth Amendment to the Constitution of the United States.

XIV.

Complainant further states that in the transportation of the commodities herein above set forth between the points of origin and the points of destination named, all being within the State of Kentucky, the Complainant would, if the aforementioned Orders of the Commission should be put into force and effect, be restricted to charging, collecting, and receiving no higher rates for such services than those which the Commission has prescribed in its said Orders and although the same are unreasonably low, and unjust, the Complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates.

And in the great number of prosecutions by indictment that may, and will, be found and prosecuted against complainant, its officers, agents, and employees, to recover the excessive fines and penalties imposed by the McChord Act, the schedule of rates made and fixed by the Commission must and will be taken by the Courts having criminal jurisdiction of the public offenses to be final and conclusive that the rates prescribed therein are just and reasonable, and that any higher rates charged or collected by complainant are unjust, unreasonable and extortionate, and therefore in violation of law or of the provisions of the McChord Act.

Complainant states that the question as to what is a just, reasonable, and non-confiscatory rate to be charged or collected for the transportation of freight or other traffic is an exceedingly difficult and complicated one, for the consideration of which a jury is wholly unsuited, and it is a question which requires for its determination an inquiry into numerous and technical facts to
34 prove the existence of which necessitates the introduction of many witnesses, including the railroad officials, agents, and employees, who are engaged with duties of great importance to the public, the proper discharge of which requires the most constant attention of such officials, agents, and employés, in the offices where their books, records, and papers are kept.

Complainant states that if in the operation of its lines within the State of Kentucky, upon which said points of origin and of destination are located, Complainant fails or refuses to accept or to put into force and effect the schedule of reduced rates as prescribed in the Orders of the Commission aforesaid, defendants will cause to be instituted a great number of prosecutions by indictment against Complainant, its officers, agents, and employés, through the Grand Jury and Commonwealth's Attorney of each of the several Counties into or through which the line or lines of road carrying the freight are owned or operated by complainant, as well as in the County of Franklin, to recover the excessive fines and penalties imposed by the McChord Act for violations thereof, and Complainant will be subjected to great expense in loss of time of its officers, agents, and employés in giving the necessary attention for the defense of such prosecutions.

XV.

Complainant further says that the defendants had no authority or power under the laws of the State of Kentucky to award reparation to the Greenbrier Distillery Company in the sum of Five Hundred and Thirty-two and sixty-two one-hundredths Dollars, ($532.62), or in any other sum, for alleged excess of freight paid over and above what the Commission has fixed as a just and reasonable rate for the service rendered, or to award to any of the other plaintiffs in the proceeding before said Commission hereinabove described the sum of money awarded to it by said Order of August 10, 1910. Nevertheless, as hereinabove shown, upon the failure of this Complainant to pay to each of said corporations, plaintiffs in said proceeding, the sum hereinabove and in said Order set opposite their re-
35 spective names, the defendant, Adam T. Siler, as Chairman of said Commission, will, pursuant to its said Order, file a certified copy of said Order, Finding, and Award in the Office of the Clerk of the Circuit Court of the County into or through which the line or lines of road carrying the freight for the transportation of which said award was made, extend, said roads being owned or operated by this Complainant, and said copy of Order, Finding and Award will be so filed by said defendant to the end that the plaintiff or plaintiffs in said proceeding, to whom such awards have been made by the Railroad Commission of Kentucky, may recover of this Complainant their respective sums, and Complainant states that a separate action will thus be brought against this Complainant by each of the said plaintiffs in the said proceeding for the recovery of their respective sums.

XVI.

And Complainant states that in the multiplicity of such legal proceedings, which it seeks to avoid, the same questions would be involved without any opportunity for Complainant or its officers, agents, or employés, as the case may be, to make a defense or to show by evidence the reasonableness or justness of its said existing rates or the unreasonableness and unjustness of the rates aforesaid fixed by said Commission and the merits of any defense justifying a failure or refusal to obey said Order or Orders of the Commission cannot be tried in a court of law or in a court of criminal jurisdiction or be fully and finally settled otherwise than in a court of equity, and Complainant has no adequate remedy at law.

Complainant states that the defendants are threatening to carry out their said orders reducing the rates aforementioned by recommending and procuring numerous indictments against Complainant, its officers, agents, and employés on and after September 9, 1910, to recover the fines and penalties prescribed by the McChord Act, and the defendant Adam T. Siler, as Chairman of said Commission, threatens to file a copy of said Order of reparation, finding, and award in the Office of the Clerk of the Circuit Court of each of the Counties above mentioned, to the end that the plaintiffs in
36 said proceeding before the Commission may recover of this Complainant the respective sums set opposite their names in

said Order and Award, and the defendants will carry out their several purposes unless immediately restrained and enjoined by this Court from doing so.

Complainant states that it is not bound by, nor does it intend to obey, the several Orders of the Commission, either fixing the rates aforesaid or awarding reparation, and it does not intend to put into force and effect the rates so made and fixed by the Commission, and that it will neither put into force and effect said rates nor will it pay to each or any of the complainants or plaintiffs in said proceeding the sum set opposite their respective names in said Order of Reparation, unless denied relief from said respective Orders by the Court having final jurisdiction of this cause.

XVII.

Complainant further states that this is a suit in equity of a civil nature; that the matter in dispute far exceeds exclusive of interest and costs, the sum or value of Two Thousand Dollars, ($2000.00); that this cause is a suit arising under the Constitution of the United States, to wit, Section 4 of Article IV and Section 1 of Article XIV of the Amendment to said Constitution and other provisions thereof as hereinabove set forth.

In consideration whereof and for as much as Complainant is remediless in the premises at law or under the rules of the common law and can have adequate relief only in a court of equity where matters of this nature are properly cognizable and relievable, to the end that the defendant hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if same were again herein repeated and they were thereunto interrogated, Complainant prays that an injunction may issue out of this Court restraining and enjoining the defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton and each of them individually and jointly as constituting the Railroad Commission of the State of Kentucky, from continuing said Orders of August 10, 1910, mailed to and received by Complainant's General Attorney on August 31, 1910, or at any time thereafter; also restraining and
37 enjoining said defendants and each of them individually and jointly as constituting the Railroad Commission of the State of Kentucky from recommending or causing to be instituted any prosecution by indictment or otherwise against Complainant or any of its officers, agents, or employés to recover any fine or penalty imposed by the McChord Act for or on account of Complainant's failure or refusal to put into force or effect on any of its lines of railroad in the State of Kentucky under protest or otherwise said Commission's Order promulgated August 31, 1910, or the rates fixed in the schedule prepared thereafter; also restraining and enjoining said defendant, Adam T. Siler, as Chairman of said Commission, from filing a certified copy of the Order, Finding and Award of Reparation, together with the evidence heard, in the Office of the Clerk of the Circuit Court of any of the Counties having jurisdiction or into or through which the line or lines of road owned or operated by this Complainant carrying the freight, concerning which said Award

was made, or in the Office of the Clerk of the Circuit Court of any other County within the State of Kentucky;

And that in the meantime and until a decision can be had upon Complainant's Motion for the Injunction herein prayed for, a Restraining Order be granted immediately restraining the acts sought herein to be enjoined, Complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until said Motion for an Injunction be heard and determined; that a writ of injunction be issued commanding and enjoining plaintiffs, as above prayed for, and on final hearing that said injunction, as herein prayed for, be made perpetual; that said two Orders of August 10, 1910, promulgated August 31, 1910, and the schedule of rates made and fixed by the Commission and the Finding and Award of Reparation contained in the second of said Orders, be forewith declared null and void by decree of this Court, and that a mandatory injunction be issued commanding said defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, constituting said Commission, to recall and revoke and abolish said Orders and Award, and each of them, and that the said McChord Act under which defendants claim power and authority to make said orders, be declared and adjudged by decree of this Court to be in violation of the Constitution of the
38 United States and of the Constitution of the State of Kentucky, and therefore invalid, null, and void; and that Complainant may have such other relief as in equity it may appear to be entitled to.

And your Complainant prays that there be granted unto it the temporary Order aforesaid, the writ of injunction aforesaid, and a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court directed to said defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarleton, individually and as Railroad Commissioners of the State of Kentucky, commanding them, under a penalty to be therein fixed, to appear on some certain day to be therein named, before this Honorable Court and then and there to answer but not under oath, (said oath being hereby expressly waived), all and singular the premises and to stand to and to perform and abide by such order, direction, and decrees as may be made against them in the premises, and as shall seem to Your Honors to be meet and agreeable to equity and good conscience, and your Complainant will ever pray.

This is the first and only application for a restraining order or injunction in this cause.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By ALBERT S. BRANDERS,
WILLIAM G. DEARING,
HENRY L. STONE,
Counsel.

STATE OF KENTUCKY,
Jefferson County:

Personally appeared before me, H. C. McLellen, a Notary Public, duly commissioned, qualified and acting in and for the County and State aforesaid, Addison R. Smith, who, being duly sworn by me, deposes and says:

That he is the Third Vice President of the Louisville and Nashville Railroad Company, the Complainant in the foregoing Bill and knows the contents thereof; that the facts therein stated as of Complainant's own knowledge are true; and the facts therein
39 stated as upon Complainant's information and belief, he believes to be true.

ADDISON R. SMITH.

Subscribed and sworn to before me this 7th day of Sept. A. D., 1910.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 26th day of February, A. D., 1912.

[SEAL.] H. C. McLELLEN,
Notary Public, Jefferson County, Ky.

Filed Sept. 7, 1910, Chas. N. Wiard, Clerk.

Exhibit "A", referred to and filed with the foregoing Bill of Complaint on September 7, A. D., 1910, is in words and figures as follows, to wit:—

(Here follows table marked page 40.)

Explanation of *A*

C. L.—Carload. L. C. L.—Less than carload. K. D.—Kn

Net Rates in Cents Per Hundred L

To—	From—	Bbl. & box mt., K. D. C. L., min. wt. 30,000 lbs.		L. C. L.		Barrels, empty; C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.	
		Old.	New. [§]	Old.	New. [§]	Old.	New. [§]	Old.	New. [§]
Bardstown, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	11	*11	23	28	14	28	43	43
"	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Chapeze, Ky.	Louisville (proper) Ky.	5	5	13	13	9	13	20	20
Chicago, Ky.	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Clermont, Ky.	Louisville, Ky. (proper)	6	5	15	13	9	13	23	20
Coon Hollow, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	12	12	20.5	34	14	34	37.5	50
"	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Deatsville, Ky.	Louisville, (proper), Ky.	6	6	15	15	9	15	23	23
Early Times, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Gethsemane, Ky.	Louisville, (proper) Ky.	6	7	15	21	10	21	26	30
Greenbrier, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Hobbs, Ky.	Louisville, (proper) Ky.	6	5	15	13	9	13	23	20
Hunters, Ky.	Louisville (proper) Ky.	6	5	15	13	9	13	23	20
Lebanon, Ky.	Louisville (proper) Ky.	7	8	15	26	10	26	26	39
Loretto, Ky.	Louisville (proper) Ky.	7	7	15	23	10	23	26	34
St. Marys, Ky.	Louisville (proper) Ky.	7	8	15	24	10	24	26	35
Samuels, Ky.	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Silver Creek, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	10	10	19	19	12	19	35	35
"	Louisville (proper) Ky.	10	10	19	19	12	19	35	35

NOTE:

* New minimum 10,000 lbs. per 100 lbs.
† " " 24,000 "
‡ New boxes, wooden, empty, C. L. minimum 15,000 lbs.
[§ Column marked thus written in red ink in copy.]

EXHIBIT "A."

Explanation of Abbreviations.

L. C. L.—Less than carload. K. D.—Knocked down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight.

Net Rates in Cents Per Hundred Lbs. Unless Otherwise Specified.

Bbl. & box mt., K. D. C. L., min. wt. 30,000 lbs.				Barrels, empty; C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.		Bottle covers, paper or straw, packed or pressed in bales. C. L., min. wt. 15,000 lbs.				Bottles, common, packed, released. C. L., min. wt. 24,000 pounds.				Boxes, empty, any qty.		Corn, Rye, malt, barley; C. L., min. wt. 24,000 lbs.		Iron, hoop. C. L., min. wt. 24,000 pounds.	
		L. C. L.								L. C. L.				L. C. L.							
Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.
	[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]
11	*11	23	28	14	28	43	43	23	†28	29	32	25	30	31.5	37	28	‡28	10	16	....	..
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
5	5	13	13	9	13	20	20	13	13	17	15	10	14	15	17	13	13	5	8	8	13
7	7	15	22	10	22	26	32	15	22	23	28	17	24	20	28	15	22	6	10	12.5	21
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
12	12	20.5	34	14	34	37.5	50	20.5	34	33	38	23.5	36	28.5	44	21.5	34	11	18	17	29
7	7	15	22	10	22	26	32	15	22	23	26	17	24	20	28	15	22	6	10	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	7	15	21	10	21	26	30	15	21	20	23	17	22	20	27	15	21	6	10	12.5	21
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
7	8	15	26	10	26	26	39	15	26	23	31	17	25	20	34	15	26	6	11	12.5	21
7	7	15	23	10	23	26	34	15	23	23	26	17	25	20	30	15	23	6	11	12.5	21
7	8	15	24	10	24	26	35	15	24	23	28	17	26	20	31	15	24	6	11	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	

imum 15,000 lbs.
nk in copy.]

41 Exhibit "B", referred to and filed with the foregoing Bill of Complaint on September 7, A. D., 1910, is in words and figures as follows, to wit:—

42 "EXHIBIT B."

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The complainants herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communicaion from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said Complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House in the City of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Lawrence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission and by agreement of parties the 28th day of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties and on said day and date pursuant to said agreement the Commission met at the Galt House in said city, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

The Commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected and received by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable, and by charging said rates defendant is, and has been, guilty of extortion.

It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is, hereby forbidden to
43 charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:

Rates in Cents Per One Hundred Pounds Unless Otherwise Specified.

To—	From—	Bbl.-box material, K. D.; minimum wt., 30,000 lbs.		Bbls., empty; min., 120 bbls., per bbl.	Bottle caps, metal, any quantity.	Bots. covs., paper or straw, packed or pressed in bales; min. wt., 20,000 lbs.		Bots., com., packed or released; minimum wt., 24,000 lbs.		Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop; min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Newport, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Chapeze	Louisville, Ky.	5	13	9	20	13	15	10	15	15	5	8
Chicago	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Clermont	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	....
Coon Hollow	Covington, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Newport, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Deatsville	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Early Times	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Gethsemane, Ky.	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12.5
Greenbrier	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	....
Hobbs	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	....
Lebanon	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Loretto	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
St. Marys	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Samuels	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Silver Creek	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	....
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	....
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	....
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

Explanation of Abbreviations.

C. L.—Carload. L. C. L.—Less Carload. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

44 The Commission is of the opinion that the foregoing rates so fixed for the transportation of said commodities from and to said points are just and reasonable.

It is further ordered that this order be entered upon the records of this office, and a copy thereof attested by the Secretary of the Commission be furnished defendant.

This August 10, 1910.

A. T. SILER, *Chairman.*
L. P. TARLTON, *Commissioner.*
L. B. FINN, *Commissioner.*

Attest:
D. B. CORNETT, *Secretary.*

45 Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The complainants herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communication from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House, in the City of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Lawrence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission and by agreement of parties the 28th day of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties, and on said day and date, pursuant to said agreement, the Commission met at the Galt House in said City, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

The Commission now being fully advised, is of the opinion, and so orders, that the rates now charged, collected and received by defendant for the transportation of the commodities to and from the points fully set out in an order this day entered fixing just and reasonable rates in the above styled complaint, and as stated in said order are extortionate, unjust and unreasonable, and that by charging said extortionate rates said defendant is and has been guilty of extortion.

46 It further appearing to the Commission that the said rates upon said commodities have been charged, collected and re-

ceived by defendant since the 25th day of March, 1910, and it appearing that the complainants hereinafter named have paid to defendant the following sums in excess of just and reasonable rates for the transportation of said commodities to and from said points, this day fixed by the Commission as just and reasonable rates and as set out in said complaint, each of said complainants are awarded the following sums, to wit:

Greenbrier Distillery Company	$532.62
Clear Springs Distilling Company	481.89
Early Times Distillery Company	408.51
Mueller, Wathen & Kobert	400.77
S. Grabfelder & Company	325.78
Willow Springs Distilling Company	321.62
Wright & Taylor	257.50
Taylor & Williams	237.19
Eminence Distillery Co.	248.37
Old Gran Dad Distillery Company	231.38
T. W. Samuels Distillery	123.42
Warwick Distillery Company	127.74
Burks Spring Distillery Company	145.25
W. B. Samuels & Co.	58.81
M. C. Beam & Co.	57.42
Head & Parker	44.80
Blair, Osborne & Ballard Distilling Co.	42.96
Tom Moore Distillery	44.51
Brown-Forman Company	
Bernheim Distilling Company	
Mattingly & Moore Distillery Co.	
F. G. Walker Company	
Charles Kobert & Company	
Smith Distillery Company	
R. Cummins & Company	

47 It is, therefore, ordered that each of said complainants are entitled to recover of defendant the sums hereinabove respectively indicated.

It is further ordered that upon the failure of defendant to pay each of said complainants the sum set opposite their respective names as hereinabove stated, that a certified copy of this order, finding and award, together with the evidence heard, be filed by A. T. Siler, Chairman of this Commission, in the office of the Clerk of the Circuit Court of the county having jurisdiction, as provided by law, to the end that plaintiffs may recover of said defendant their respective sums.

It is further ordered that this order be recorded upon the record books of this Commission,, and that a certified copy of this order be furnished to defendant.

This August 10, 1910.

A. T. SILER, *Chairman.*
L. P. TARLTON, *Commissioner.*
L. B. FINN, *Commissioner.*

STATE OF KENTUCKY,
County of Franklin, set:

I, D. B. Cornett, Secretary of the Railroad Commission of Kentucky, hereby certify that the above and foregoing is a true and correct copy of an order as appears of record on the Order Book in the office of the Railroad Commission of Kentucky, at Frankfort, Kentucky.

This August 10, 1910.

D. B. CORNETT,
Secretary Railroad Commission.

Exhibit "C," referred to and filed with the foregoing Bill of Complaint on Sept. 7, 1910, is in words and figures as follows, viz:—

48 "EXHIBIT C."

Copy.

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY, WRIGHT & TAYLOR, OLD GRAN Dad Distillery Company, Brown-Forman Co., S. Grabfelder & Co., Bernheim Distilling Co., Taylor & Williams, Tom Moore Distillery, Mattingly & Moore Distillery Co., F. G. Walker Co., Mueller, Wathen & Kobert, Charles Kobert & Co., Early Times Distillery Company, Clear Springs Distillery Company, T. W. Samuels Distillery, W. B. Samuels & Co., Willow Springs Distilling Company, Blair, Osborne & Ballard Distilling Co., M. C. Beam & Co., Head & Parker, Smith Distillery Company, R. Cummins & Co., Burks Spring Distillery Company, Plaintiffs,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

Paragraph No. 1.

Plaintiffs say that each of them is a corporation duly incorporated and empowered under the laws of Kentucky to transact the business in which they are now engaged, to contract and be contracted with, sue and be sued in their respective corporate names, and as such corporations are and were on the dates hereinafter stated engaged in the distillery business; that is to say, each and all are and were engaged in the manufacture, storage, preparation for market and sale of whiskey and other distillery products, and in the shipping of such products to and from their respective plants located upon the lines and at the following named stations of defendant, the Louisville and Nashville Railroad, to wit:—

49 Greenbrier Distillery Company, Greenbrier, Ky.,
Wright & Taylor, Chapeze, Ky.,

Old Gran Dad Distillery Company, Hobbs, Ky.,
Brown-Forman Company, St. Mary's, Ky.,
S. Grabfelder & Company, Clermont, Ky.,
Bernheim Distilling Company, Silver Creek, Ky.,
Taylor & Williams, Gethsemane, Ky.
Tom Moore Distillery, Bardstown, Ky.,
Mattingly & Moore Distillery Company, Bardstown, Ky.,
F. G. Walker Company, Bardstown, Ky.,
Mueller, Wathen & Kobert, Lebanon, Ky.,
Charles Kobert & Company, Lebanon, Ky.,
Early Times Distillery Company, Early Times, Ky.,
Clear Springs Distilling Company, Bardstown, Ky.,
T. W. Samuels Distillery, Deatsville, Ky.,
W. B. Samuels & Company, Samuels, Ky.,
Willow Springs Distilling Company, Coon Hollow, Ky.,
Blair, Osborne & Ballard Distilling Company, Chicago, Ky.,
M. C. Beam & Company, Gethsemane, Ky.,
Head & Parker, Gethsemane, Ky.,
Smith Distillery Company, Chicago, Ky.,
R. Cummins & Company, Loretto, Ky.,
Burks Spring Distillery Company, Loretto, Ky.

Plaintiffs say that defendant, Louisville & Nashville Railroad Company, is a corporation duly incorporated and operated as a common carrier in various Counties in the State of Kentucky and elsewhere, and especially to and from the points hereinafter enumerated, shown in Exhibit A hereinafter more fully referred to.

Plaintiffs say that in order to carry on and operate their respective distilleries it is and was necessary for each of them to cause to be transported over defendant's lines from various points in Kentucky, as shown by said Exhibit, to their respective plants, various
50 commodities necessary to be used by them, and as further shown by said Exhibit all for the purpose of use in the manufacture and preparation of whiskey and other distillery products for the markets.

Plaintiffs say that inasmuch as the present rates herein complained of, and the commodities upon which the same are and were assessed, as well as the former rates, points of origin and of destination, can be more conveniently compared, shown or illustrated in exhibit form, such an exhibit is hereto attached, marked "Exhibit A" and made part hereof as if fully set out herein.

Plaintiffs say that for many years prior to the 25th day of March, 1910, defendant transported over its line or lines of railroad to and from points wholly within the State of Kentucky, the various commodities shown in said exhibit, and charged, collected, and received from plaintiffs during said time the rates printed therein, from said points of origin to their said respective plants; that on the 15th day of March, 1910, defendant issued its Circular #2910 cancelling each and all of said printed rates shown in said Exhibit, and in lieu thereof—effective March 25, 1910—substituted therefor the rates designated new rates as shown by the figures inserted therein in red ink, and for the transportation of all of said Commodities to and

from the points shown in said Exhibit has ever since and still charges, collects and receives from plaintiffs the said increased rates as aforesaid.

Plaintiffs say that each and all of said increased rates so charged, collected and received from said points of origin to the respective plants of each of the plaintiffs as shown in said Exhibit, wherein the same are in excess of said former rates, are extortionate, unjust, and unreasonable; that defendant as aforesaid had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants upon the faith of said
51 former rates, and had maintained said rates for many years as just and reasonable rates, all of which were and are fairly remunerative, and were and are no more than just and reasonable compensation for the transportation of said commodities to and from said points.

Wherefore, plaintiffs pray that this Honorable Commission, after due notice herein and investigation, make and fix just and reasonable rates to and from all points and upon all commodities as shown in said Exhibit A, and that said rates be fixed no higher than those charged, collected and received by the defendant for the transportation of said commodities to and from said points prior to the cancellation of said former rates effective March 25, 1910, as hereinbefore stated; and plaintiffs pray for all other necessary orders in the premises.

Paragraph 2.

For further cause of action herein plaintiffs reiterate and reaffirm all the allegations contained in the first paragraph herein, and say that by reason of the acts upon the part of the defendant set out in Paragraph No. 1, and especially the fact that defendant has continuously charged, collected and received from plaintiffs since the 25th day of March, 1910, and continues so to do, the increased rates shown in Exhibit A filed in Paragraph No. 1, defendant to the extent of the difference between said former rates and the present rates now in effect, as set out in said first Paragraph and said Exhibit A, has and continues to charge, collect and receive from plaintiffs and each of them, extortionate, unjust and unreasonable rates for the transportation of commodities named in said Exhibit A and the several Exhibits hereinafter filed by each of the plaintiffs herein, which latter Exhibits show the amount of such extortionate charges and collections from each of the plaintiffs to the dates therein respectively stated and which are, as follows, to wit:—

52 EXHIBIT.

1. Greenbrier Distillery Company	$532.62
2. Wright & Taylor	$257.50
3. Old Gran Dad Distillery Company	$231.38
4. Brown-Forman Company	$
5. S. Grabfelder & Co.	$325.78
6. Bernheim Distilling Co.	$

7.	Taylor & Williams	$237.19
8.	Tom Moore Distillery	$ 41.51
9.	Mattingly & Moore Distillery Co.	$
10.	F. G. Walker & Co.	$
11.	Mueller, Wathen & Kobert	$400.77
12.	Charles Kobert & Co.	$
13.	Early Times Distillery Co.	$408.51
14.	Clear Springs Distilling Co.	$481.89
15.	T. W. Samuels Distillery	$123.42
16.	W. B. Samuels & Co.	$ 58.81
17.	Willow Springs Distilling Co.	$321.62
18.	Blair, Osborne & Ballard Distilling Co.	$ 42.96
19.	M. C. Beam & Co.	$ 57.42
20.	Head & Parker	$ 44.80
21.	Smith Distillery Company	$
22.	R. Cummins & Company	$
23.	Burks Spring Distillery Co.	$145.25

Wherefore plaintiffs pray that reparation be awarded each of them for the amounts shown to be severally due from their respective Exhibits hereinbefore referred to, and that an award be made to each of them by this Honorable Commission for said respective sums; and plaintiffs pray for all further and necessary orders and proceedings to which they may be entitled in the premises.

McCHORD, HINES & NORMAN,
Attorneys for Plaintiffs.

53 Copy.

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY, WRIGHT & TAYLOR, OLD GRAN DAD Distillery Company, Brown-Forman Company, S. Grabfelder & Co., Bernheim Distilling Company, Taylor & Williams, Tom Moore Distillery, Mattingly & Moore Distillery Company, F. G Walker & Company, Mueller, Wathen & Kobert, Charles Kobert & Co., Early Times Distillery Company, Clear Springs Distilling Company, T. W. Samuels Distillery, W. B. Samuels & Co., Willow Springs Distilling Co., Blair, Osborne & Ballard Distilling Co., M. C. Beam & Co., Head & Parker, Smith Distillery Company, R. Cummins & Company, Burks Spring Distillery Company, Plaintiffs,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

Now comes the Defendant Louisville and Nashville Railroad Company, and for answer herein states that it is true that it increased the rates as shown in Exhibit "A" of plaintiffs, yet Defendant denies that the said increased rates so charged, collected or

Explanations of Al

C. L.—Carload. L. C. L. Less than carload. K. D.—Knocked

Net Rates in Cents Per Hundred Lb

To—	From—	Bbl. & box m'f'd, K. D. C. L., min. wt. 30,000 lbs.		L. C. L.		Barrels, empty. C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.	
		Old.	New.	Old.	New.	Old.	New.	Old.	New.
			[§]		[§]		[§]		[§]
Bardstown, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	11	*11	23	28	14	28	43	43
"	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Chapeze, Ky.	Louisville (proper) Ky.	5	5	13	23	9	13	20	20
Chicago, Ky.	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Clermont, Ky.	Louisville, Ky. (proper)	6	5	15	13	9	13	23	20
Coon Hollow, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	12	12	20.5	34	14	34	37.5	50
"	Louisville (proper) Ky.	7	7	15	22	10	22	26	32
Deatsville, Ky	Louisville, (proper), Ky.	6	6	15	15	9	15	23	23
Early Times, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Gethsemane, Ky.	Louisville, (proper) Ky.	6	7	15	21	10	21	26	30
Greenbrier, Ky.	Louisville, (proper) Ky.	6	7	15	21	9	21	23	30
Hobbs, Ky.	Louisville, (proper) Ky.	6	5	15	13	9	13	23	20
Hunters, Ky.	Louisville (proper) Ky.	6	5	15	13	9	13	23	20
Lebanon, Ky.	Louisville (proper) Ky.	7	8	15	26	10	26	26	39
Loretto, Ky.	Louisville (proper) Ky.	7	7	15	23	10	23	26	34
St. Marys, Ky.	Louisville (proper) Ky.	7	8	15	24	10	24	26	35
Samuels, Ky.	Louisville (proper) Ky.	6	6	15	15	9	15	23	23
Silver Creek, Ky.	(Covington (proper) Ky.) (Newport (proper) Ky.)	10	10	19	19	12	19	35	35
"	Louisville (proper) Ky.	10	10	19	19	12	19	35	35

NOTE:

* New minimum 10,000 lbs. per 100 lbs.
† " " 24,000 lbs.
§ Boxes, wooden, empty. C. L. minimum 15,000 lbs.
§ Columns marked thus written in red ink.

Exhibit D.

Explanations of Abbreviations.

L. C. L. Less than carload. K. D.—Knocked down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight.

Net Rates in Cents Per Hundred Lbs. Unless Otherwise Specified.

Bbl. & box m'f'l, K. D. C. L., min. wt. 30,000 lbs.		L. C. L.		Barrels, empty, C. L., min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.		Bottle covers, paper or straw, packed or pressed in bales. C. L., min. wt. 15,000 lbs.		L. C. L.		Bottles, common, packed, released. C. L., min. wt. 24,000 pounds.		L. C. L.		Boxes, empty, any qty.		Cow, rye, malt, barley, C. L., min. wt. 24,000 lbs.		Iron, hoop, C. L., min. wt. 24,000 pounds.	
Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.	Old.	New.
	[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]		[§]
11	*11	23	28	14	28	43	43	23	†28	29	32	25	30	31.5	37	28	†28	10	16	....	..
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
5	5	13	23	9	13	20	20	13	13	17	15	10	14	15	17	13	13	5	8	8	13
7	7	15	22	10	22	26	32	15	22	23	28	17	24	20	28	15	22	6	10	12.5	21
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
12	12	20.5	34	14	34	37.5	50	20.5	34	33	38	23.5	36	28.5	44	21.5	34	11	18	17	29
7	7	15	22	10	22	26	32	15	22	23	26	17	24	20	28	15	22	6	10	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	7	15	21	10	21	26	30	15	21	20	23	17	22	20	27	15	21	6	10	12.5	21
6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
7	8	15	26	10	26	26	39	15	26	23	31	17	25	20	34	15	26	6	11	12.5	21
7	7	15	23	10	23	26	34	15	23	23	26	17	25	20	30	15	23	6	11	12.5	21
7	8	15	24	10	24	26	35	15	24	23	28	17	26	20	31	15	24	6	11	12.5	21
6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..
10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..

75,040 lbs.
ok.

received from the points of origin mentioned in the petition to the respective plants of the plaintiffs, as shown in the aforesaid Exhibit, are extortionate or unjust, or unreasonable, and it further denies that this Defendant induced the plaintiffs, or each of them or any of them, to expend large sums of money in the erection of, or in making any additions to, their several plants, upon the faith of said former rates. While it is true it had maintained said rates for many years, it denies that these rates were fairly remunerative, and denies that said rates as they formerly were, prior to said advancement, were or are fairly remunerative, or that they were or are no more than just or reasonable compensation for the transportation of said commodities to or from said points.

54 It further denies that said increased rates are extortionate, unjust or unreasonable for the transportation of the commodities named in Exhibit "A," or the several Exhibits filed by the complainants herein, and denies that the complainant Greenbrier Distillery Company is entitled to recover the sum of $532.62, or any other sum.

Defendant further denies that the plaintiff T. W. Samuels Distillery is entitled to recover $123.48, or any other amount; that the Early Times Distillery Company is entitled to recover $408.51, or any other amount; that Mueller, Wathen & Kobert is entitled to recover $400.77, or any other amount; that Tom Moore Distillery is entitled to recover $44.51, or any other amount; that W. B. Samuels & Company is entitled to recover $18.81, or any other amount; that M. C. Beam & Company is entitled to recover $57.42, or any other amount; that Old Gran Dad Distillery Company is entitled to $231.58, or any other amount; that Head & Parker is entitled to $44.80, or any other amount; that Wright & Taylor is entitled to recover $257.50, or any other amount; that Clear Springs Distilling Company is entitled to $481.89, or any other amount; that S. Grabfelder & Company is entitled to $325.78, or any other amount; that Taylor & Williams is entitled to recover $237.19, or any other amount; that Willow Springs Distilling Company is entitled to $321.62, or any other amount, that Blair, Osborne & Ballard Distilling Co. is entitled to $42.96, or any other amount.

Wherefore, having fully answered, this defendant prays that the complaint be dismissed, and for all proper relief in the premises.

(Signed) WM. G. DEARING,
Attorney, L. & N. R. R.

Filed Sept. 7, 1910. Chas. N. Wiard, Clerk.

Exhibit "D," referred to and filed with the foregoing Bill of Complaint on Sept. 7, A. D., 1910, is in words and figures as follows, viz:

(Here follows table, marked page 55.)

56 On the same day, to wit: on the 7th day of September, A. D., 1910, Subpœna in Chancery was issued in said cause, which is in words and figures as follows, viz:

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

The President of the United States of America to the Marshal of the Eastern Kentucky District, Greeting:

You are hereby commanded to summon Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, to appear before our Circuit Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Frankfort, on the first Monday in October next, to answer a bill in equity exhibited against them in our said Court, by Louisville and Nashville Railroad Company and this they shall in nowise omit, under the penalty of four hundred dollars; and have you then there this writ.

In testimony whereof, John M. Harlan, Esq., Senior Associate Justice of the Supreme Court of the United States of America, hath caused the Seal of our said Circuit Court to be hereunto affixed, at the Clerk's Office of said Court in Frankfort, this 7th day of September, A. D., 1910, and in the 135th year of our Independence.

Attest:

CHAS. N. WIARD, *Clerk.*
By MARY SCOTTOW, *Deputy.*

Memorandum.

The said defendants are required to enter their appearance in the Clerk's Office of said Court, on or before the first Monday in October 1910; otherwise the said Bill may be taken pro confesso.

CHAS. N. WIARD, *Clerk.*
By MARY SCOTTOW, *D. C.*

The Marshal's return on the foregoing Subpœna in Chancery is in words and figures as follows, viz:

57 Received this Subpœna at Frankfort, Ky., on the 7th day of September, 1910, and executed same by delivering a true copy of same to each of the within named defendants, at Frankfort, Ky., on Sept. 7, 1910.

A. B. PATRICK,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

Fee $6.00.

The foregoing Subpœna in Chancery was returned and filed on Sep. 8, 1910 & endorsed as follows:

Filed Sep. 8, 1910. Chas. N. Wiard, Clerk.

On the same day, to wit: on the 7th day of September, A. D. 1910, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

58 Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky, at Frankfort, Wednesday September 7, 1910.

Court met pursuant to adjournment.
Present: Honorable A. M. J. Cochran, Judge.

#686.

Louisville and Nashville Railroad Company, Complainant,
versus
Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The Complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the Bill of Complaint, and said Motion is now fixed for hearing on the 26th day of September 1910, at 2 P. M., in the Court Room in the City of Frankfort, Kentucky, and it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction unless said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted and that Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force or effect their orders of August 10, 1910, reducing the railroad rates of the Complainant on intrastate freight, being the following named commodities between the points of origin and point of destination, and making and fixing the rates as herein below named, to wit:

C. L.—Car Load. L. C. L.—Less Car Load. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

Rates in Cents Per Hundred Pounds Unless Otherwise Specified.

To—	From—	Bbl.-box material, K. D.; min. wt., 30,000 lbs.		Bbls., empty; minimum, 120 bbls. per bbl.	Bots. caps, metal, any quantity	Bots., boys, paper or straw, packed or pressed in bales; min. wt., 15,000 lbs.		Bots., comm., packed or released; min. wt., 24,000 lbs.		Boxes, empty; any quantity	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop; min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington (prop.), Ky.											
	Newport (prop.)	11	23	14	43	23	29	25	31½	28	10	..
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Chapeze,	Louisville, Ky.	5	13	9	20	13	15	10	15	13	5	8
Chicago,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Clermont,	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	..
Coon Hollow,	Covington, Ky.											
	Newport, Ky.	12	20½	14	57½	20½	33	23½	28½	21½	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Deatsville,	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	..
Early Times,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Gethsemane,	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12½
Greenbrier,	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	..
Hobbs,	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	..
Lebanon,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Loretto,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
St. Marys,	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12½
Samuels,	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	..
Silver Creek,	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	..
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	..
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	..
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

60 or putting into force and effect the schedule of said rates or any of them, and said defendants also are restrained and enjoined, individually and jointly, as constituting said Railroad Commission of Kentucky, from recommending or causing to be instituted any prosecution by indictment or other legal proceeding against the Complainant or any of its officers agents, or employés to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever for or on account of Complainant's failure or refusal to put into force and effect the Railroad Commission's orders or any of them aforementioned, or the rates fixed and prepared thereunder, and said defendants are also restrained and enjoined, individually and jointly as constituting the Railroad Commission of Kentucky, and especially Adam T. Siler, as Chairman of said Railroad Commission, is enjoined from taking any steps to enforce the Order, Finding, and Award of August 10, 1910, whereunder, among other things, award of reparation was ordered to be made by this complainant to the Greenbrier Distillery Company and other plaintiffs, and is especially enjoined from filing a certified copy of said Order, Finding, and Award of August 10, 1910, with or without the evidence heard, in the Office of the Clerk of the Circuit Court of any County having jurisdiction as provided by law, or of any County into or through which the line or lines of road owned or operated by this Complainant carrying the freight as to which the award of reparation in said Order, Finding, and Award was made, or of any other County within the State of Kentucky; and that said defendants, individually and jointly as aforesaid, are so restrained and enjoined until a hearing upon said application for writ of injunction and the further order of the Court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of said motion, if they so desire. The first day of the next September Term of this Court at Frankfort, is fixed because it is thought by the Court that it is more convenient to the parties to hear the motion at that place.

61 On the same day, to wit, on the 7th day of September, A. D. 1910, a temporary restraining order was issued, which was and is in words and figures as follows, to wit:

Copy of Restraining Order.

Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky, at Frankfort, Wednesday, September 7, 1910.

Court met pursuant to adjournment.
Present: Honorable A. M. J. Cochran, Judge.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The complainant moved the court to grant to it a preliminary writ of injunction in accordance with the prayer of the bill of complaint, and said motion is now fixed for hearing on the 26th day of September, 1910, at 2 p. m., in the court room in the city of Frankfort, Kentucky.

And it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing
62 of said application for the writ of injunction unless said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted and that Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force or effect their orders of August 10, 1910, reducing the railroad rates of the complainant on intrastate freight, being the following named commodities between the points of origin and points of destination, and making and fixing the rates as herein below named, to-wit:

Rates in Cents Per One Hundred Pounds Unless Otherwise Specified.

To—	From—	Bbl.-box material, K. D.; minimum wt., 30,000 lbs.		Bbls., empty; min., 120 bbls., per bbl.	Bottle cans, metal, any quantity.	Bots. covs., paper or straw, packed or pressed in bales; min. wt., 15,000 lbs.		Bots., com., packed or released; minimum wt., 24,000 lbs.		Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs.	Iron, hoop, min. wt., 24,000 lbs.
		C. L.	L. C. L.	C. L.		C. L.	L. C. L.	C. L.	L. C. L.		C. L.	C. L.
Bardstown, Ky.	Covington, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Newport, Ky., proper	11	23	14	43	23	29	25	31.5	28	10	....
	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Chapeze	Louisville, Ky	5	13	9	20	13	15	10	15	15	5	8
Chicago	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Clermont	Louisville, Ky.	5	13	9	20	13	15	14	17	13	5	....
Coon Hollow	Covington, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Newport, Ky.	12	20.5	14	37.5	20.5	33	23.5	28.5	21.5	11	17
	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Deatsville	Louisville, Ky.	6	15	9	23	15	17	16	17	15	5	....
Early Times	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Gethsemane, Ky.	Louisville, Ky.	6	15	10	26	15	20	17	20	15	6	12.5
Greenbrier	Louisville, Ky.	5	15	9	23	15	20	16	17	15	5	....
Hobbs	Louisville, Ky.	5	13	9	23	15	15	14	17	13	5	....
Lebanon	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Loretto	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
St. Marys	Louisville, Ky.	7	15	10	26	15	23	17	20	15	6	12.5
Samuels	Louisville, Ky.	6	15	9	23	15	20	16	17	15	5	....
Silver Creek	Covington, Ky.	10	19	12	35	19	25	21	25	19	10	....
	Newport, Ky.	10	19	12	35	19	31	21	25	19	10	....
	Louisville, Ky.	10	19	12	35	19	31	21	25	19	10	....
Eminence, Ky.	Louisville, Ky.	6	15	10	25	17	19	18	22	17	6	17

Explanation of Abbreviations.

C. L.—Carload. **L. C. L.**—Less Carload. **K. D.**—Knocked Down. **Lbs.**—Pounds. **Min.**—Minimum. **Wt.**—Weight. **Bots.**—Bottles. **Bbl.**—Barrel.

or putting into force and effect the schedule of said rates or any of them, and said defendants also are restrained and enjoined, individually and jointly, as constituting said Railroad Commission of Kentucky, from recommending or causing to be instituted any prosecution by indictment or other legal proceeding against the complainant or any of its officers, agents, or employés to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever for or on account of complainant's failure or refusal to put into force and effect the Railroad Commission's orders or any of them aforementioned, or the rates fixed and prepared thereunder, and said defendants are also restrained and enjoined, individually and jointly as constituting the Railroad Commission of Kentucky, and especially Adam T. Siler, as Chairman of said Railroad Commission, is enjoined from taking any steps to
63 enforce the order, finding, and award of August 10, 1910, whereunder, among other things, award of reparation was ordered to be made by this complainant to the Greenbrier Distillery Company and other plaintiffs, and is especially enjoined from filing a certified copy of said order, finding, and award of August 10, 1910, with or without the evidence heard, in the office of the clerk of the circuit court of any county having jurisdiction as provided by law, or of any county into or through which the line or lines of road owned or operated by this complainant carrying the freight as to which the award of reparation in said order, finding, and award was made, or of any other county within the State of Kentucky; and that said defendants, individually and jointly as aforesaid, are so restrained and enjoined until a hearing upon said application for writ of injunction and the further order of the court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of said motion, if they so desire.

The first day of the next September term of this court at Frankfort is fixed because it is thought by the court that it is more convenient to the parties to hear the motion at that place.

September 7, 1910.

A. M. J. COCHRAN, *Judge.*

64 UNITED STATES OF AMERICA,
Eastern District of Kentucky:

I, Chas. N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing is a true and complete copy of the order made and entered September 7, 1910, in the case of Louisville & Nashville Railroad Company against Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, as the same appears from the files and records of this office.

Witness my hand as clerk of said court, and the seal thereof, at Frankfort, in said district, this 7th day of September, A. D. 1910, and of our Independence the 134th year.

CHAS. N. WIARD, *Clerk,*

[SEAL.] By MARY SCOTTOW, *D. C.*

The foregoing Restraining Order was returned and filed on Sept. 17, 1910, with the following returns endorsed thereon by the Marshals, to wit:

Received this process at Frankfort, Ky., on Sept. 8, 1910, and executed on the said day, at said place, on Lew P. Tarlton, individually, and as a member of the Railroad Commission of Kentucky, the other defendants not found in my bailiwick.

Fees $2.00.

A. B. PATRICK,
U. S. Marshal,
By N. I. McDANIEL, *D. M.*

Received this process at Williamsburg, Ky., on Sept. 10, 1910, and executed same on said day at said place on A. T. Siler,
65 R. R. Commissioner of Kentucky. The other defendants not found in my baliwick.

Fees $2.00.

A. B. PATRICK,
U. S. Marshal,
By LESTER PEACE,
D. U. S. M.

Received this restraining order and one copy at Bowling Green, Ky., on the 12th day of September, 1910, and executed same at Bowling Green, Ky., on the 12th day of September, 1910, by delivering a true copy hereof to the within named Lawrence B. Finn.

This Sept. 12, 1910.

G. W. LONG,
U. S. Marshal.
By J. A. WISE, *Deputy.*

Fees $2.00
Expense ... 1.24

$3.24

66 On a day following, to wit: on the 26th day of September, A. D., 1910, an order was made and entered in said cause, which said order is in words and figures as follows, to wit:

United States Circuit Court, Eastern District of Kentucky, Frankfort Division, September 26, 1910.

Proceedings of the Circuit Court of the United States for the Sixth Judicial Circuit and Eastern District of Kentucky, at a regular term begun and held at the Federal court room in the city of Frankfort on Monday, September 26, 1910.

Court met.
Present: Hon. A. M. J. Cochran, Judge.

686.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
ADAM T. SILER et al.

This cause coming on to be heard upon the motion of the complainant for a preliminary writ of injunction, came the complainant by Henry L. Stone, its counsel, and the defendants by James Breathitt, Jno. F. Lockett, and McChord and Hines, their counsel.

The defendants by their said counsel filed a demurrer to part of the bill and a demurrer to the whole of the bill, also the affidavits of Adam T. Siler, Lawrence B. Finn, R. H. Edelen and W. A. Miller and by consent are granted further time to prepare and file the affidavit of Lew P. Tarlton, all of said affidavits to be read and considered on the hearing of said motion.

The complainant filed the affidavits of C. B. Compton and D. M. Goodwyn to be read and considered upon said hearings.

Whereupon the judge of this court now sitting declined to sit further in this case and stated that he would certify this fact to the Honorable Henry F. Severens, presiding circuit judge for this circuit that the matter could be properly heard and determined.

67 The affidavit of C. B. Compton, referred to in the foregoing order and filed on September 26, 1910, by the complainant, is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of C. B. Compton.

Filed by Complainant in Court September 26, 1910.

The affiant, C. B. Compton, states that he is 55 years of age; resides in Louisville, Kentucky; and has been for the past nine and one-half years traffic manager of the Louisville & Nashville Railroad Company, complainant herein; that he has had over thirty-eight years' experience in the railroad business, having served the Louisville & Nashville Railroad Company during that period in various clerkships in the Freight Department and as local agent, contracting freight agent, general agent, general freight agent, and traffic manager.

Affiant states that he is familiar with the freight rates of said company, and that during his employment as general freight
68 agent and traffic manager he has been directly connected with the making of said freight rates, and that in the performance of his duties it has been necessary for him to investigate, analyze and constantly keep in touch with the numerous and varying conditions surrounding and affecting the freight business of the company and of the various cities and communities served by it; and that by reason of their influence on the interests of said company it has also been necessary for him to investigate and analyze the geographical, physical, commercial and industrial conditions prevailing in the State of Kentucky and other States in the territory south of the Ohio and Potomac rivers and east of the Mississippi River, in which territory lies the greater part of the railroad of said Louisville & Nashville Railroad Company. Affiant further says that he has also, but to a lesser extent, investigated and analyzed traffic conditions existing in other territories within the United States.

Affiant states that he is familiar with the subject matter of this proceeding, and that by reason of his experience and employment he is qualified to testify concerning the same.

Affiant states that for a long time prior to March 25, 1910, as a means of promoting, encouraging and increasing the manufacture of whiskey and the shipment thereof by way of its lines of railroad, said railroad company gave to the distilleries located along its lines

of railroad in Kentucky r[illegible] for the transportation of their
69 supplies, such as corn, rye, malt, barley, barrel and box material, empty barrels, bottle caps, bottle covers, bottles, empty boxes, hoop iron, etc., which were less than the rates charged by said railroad company between the same points of origin and destination upon the same articles when intended for and devoted to uses other than the manufacture and shipment of whiskey; that the giving of said special rates upon said articles, characterized as distillers' supplies, extended as far back as 1874, the said rates being made from season to season as the conditions and exigencies of the distillery business seemed to require; that until January 1, 1899, all of said special rates were made or constructed upon the same general basis, but upon that date still lower special rates were given said distillers on their corn, rye, malt and barley, because of the extremely depressed condition of the whiskey trade at that time; that until the passage by Congress of the so-called Hepburn Act, amending the Act to Regulate Commerce, all of said special rates were applied to both interstate and intra-state shipments; that shortly thereafter the Interstate Commerce Commission objected to the restricted application of said special rates upon interstate traffic, and also to the method of protecting them, to-wit, by billing said shipments at the standard rates and subsequently refunding to said distillers the difference between said standard rates and said special rates applicable to articles used in the manufacture and shipment of whiskey, whereupon said railroad company cancelled and withdrew said
70 special rates as to all inter-state traffic and thereafter, until March 25, 1910, applied them only to intra-state traffic within the State of Kentucky.

Affiant states that thereupon, and thereby said railroad company was likely to be forced into discrimination between intrastate and interstate traffic of the same character used for the same purpose between the same points of origin and destination; that in his capacity aforesaid, affiant investigated the history of said special rates and reached the conclusion that the conditions which had justified the making of them in the beginning had disappeared; that said distillers were established upon a firm business footing and no longer needed the assistance that had been extended to them by means of said special rates; that said special rates were not a matter of contract between said distillers or any of them and said railroad company, but had been made and extended to them as the voluntary act of said railroad company in its efforts to promote, encourage and increase the manufacture of whiskey and the shipment thereof over its lines of railroad; and affiant states that upon reaching such conclusion he, in his capacity aforesaid, cancelled and withdrew said special rates in their entirety; that since the date of said concellation and withdrawal, namely, March 25, 1910, the said railroad company has charged and collected, for the transportation of corn, rye, malt, barley, barrel and box material, empty barrels, bottle caps, bottle covers, bottles, empty boxes, hoop iron, etc., consigned to distillers and intended for use in the manufacture and

shipment of whiskey, exactly the same rates as had been
71 and were being charged and collected between the same points of origin and destination upon the same articles where consigned to other persons and intended for other uses; and that by and as the result of said action, said railroad company removed every sort and species of discrimination theretofore existing with respect to its traffic in said articles.

Affiant states that in view of the disappearance and cessation of the conditions which had originally justified the voluntary concessions to said distillers represented by said special rates, the said rates had become unjustly, unreasonably and absurdly low and a moral offense against those persons who were paying the higher or standard rates of said company, upon said articles when intended for and devoted to other uses than the manufacture and shipment of whiskey.

Affiant states that the rates charged and collected for the transportation of said articles on and after March 25, 1910, were and are the just and reasonable standard rates of said Louisville & Nashville Railroad Company; that they compare favorably with the rates charged and collected on the remaining portions of its Kentucky lines and upon its lines in the numerous other States in which said railroad company operates, and also with the rates charged and collected by other railroad companies for similar transportation in Kentucky and other States.

Affiant states that there was not then and has not been since, any complaint made by shippers or receivers of said articles when intended for and devoted to uses other than the manufacture and shipment of whiskey who had previously
72 paid, were then paying, and have since continued to pay the higher or standard rates of said railroad company, but that soon after the cancellation and withdrawal of said special rates, various distillers who had been beneficiaries thereof filed a complaint with the Railroad Commission of Kentucky against said railroad company praying, amongst other things, for an order requiring and compelling it to restore said special rates. Affiant is informed and believes that no shipper, receiver or user of said articles for purposes other than the manufacture and shipment of whiskey was a party to said complaint, or took any part in the prosecution thereof.

Affiant states that on the 10th day of August, 1910, said Railroad Commission of Kentucky entered certain orders among other things declaring the rates then charged for the transportation of said articles (which said rates were the standard rates of said Louisville & Nashville Railroad Company as hereinbefore described) to be extortionate, unjust and unreasonable, and forbidding said railroad company to charge, collect or receive, for the transportation of said articles, rates in excess of those which said railroad company had prior to March 25, 1910, applied to said articles when intended for and used in the manufacture and shipment of whiskey. Affiant states, in other words, that said orders were intended to

and did have the effect of fixing rates to be charged by said railroad company for the transportation, between the points specified therein of the articles named without reference to the uses or purposes to which such articles were to be applied by the consignees thereof; and of commanding and requiring said railroad company to apply the said rates to the shipments of said articles made by any and all persons, whether manufacturers and shippers of whiskey or otherwise and wholly without regard to the uses or purposes to which said articles were to be applied by the consignees thereof.

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Affiant states that said orders of said Railroad Commission of Kentucky are arbitrary, unreasonable and unjust:

First. Because they seek to compel said railroad company to perpetuate the special rates voluntarily given by it to said distillers, notwithstanding the conditions in consideration of which said railroad company granted said rates in the beginning had disappeared and ceased to exist long prior to March 25, 1910.

Second. Because they seek to compel said railroad company to apply the said rates to the traffic in said articles of any and all persons shipping from and to the points specified, thus giving to said special rates a broader application than was ever voluntarily given by said railroad company, notwithstanding the fact that as between said railroad company and the shippers, receivers and users of said articles for other purposes than the manufacture and shipment of whiskey, there is a complete absence of the conditions and considerations which induced said railroad company voluntarily to give said special rates in the beginning.

Third. Because the said orders, in seeking to compel said railroad company to apply upon said articles between the points specified rates which are materially less than are applied thereto between other points in the State, will, if enforced, compel said railroad company to unjustly discriminate between different sections of the State, or else to apply the said rates without distinction or discrimination between all points on its lines in the State.

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Fourth. Because said orders, if enforced, will compel said railroad company to discriminate in favor of intrastate traffic and against interstate traffic of the same character between the same points in the State of Kentucky, or else to apply the said rates without distinction or discrimination to both intrastate and interstate traffic between all points in said State of Kentucky.

Fifth. Because the said orders, if enforced, will compel said railroad company to charge materially less rates in one direction than in the other between the same points, on both intrastate and interstate traffic, or else to apply said rates without distinction or discrimination in both directions between all points.

Sixth. Because said orders, if enforced, will compel said railroad company to charge less rates upon corn, rye, malt and barley than upon wheat, oats and other kinds of grain where said railroad company has always endeavored to charge the same rate upon all kinds

of grain, or else to apply the rates fixed in said orders to all kinds of grain upon both intrastate and interstate traffic.

Seventh. Because said orders, if enforced, will compel said
75 railroad company to charge less rates upon carload quantities of grain, where said railroad company has always endeavored to charge the same rate upon carload as upon less than carload quantities, or else to establish less rates for carload than for less than carload quantities of grain upon both intrastate and interstate traffic.

Eight. Because said orders, if enforced, will compel said railroad company to accept upon interstate as well as intrastate traffic, rates which are absurdly, unusually, unjustly and unreasonably low, both per se and relatively, and which will not yield to said railroad company fair and reasonable compensation for the service performed, and which will deprive said railroad company of the fair and reasonable return which it is entitled to earn upon the property it devotes to the public use, upon interstate as well as intrastate traffic.

Ninth. Because said orders, if enforced, will compel said railroad company to charge a less rate for a long haul than for a short haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and of the United States, or else to apply said rates as maxima between all intermediate points upon interstate as well as intrastate traffic, unless relieved therefrom by the order of said Commission and of the Interstate Commerce Commission.

Tenth. Because said orders, if enforced, will inflict upon said railroad company a considerable loss of revenue and income upon interstate as well as intrastate traffic, with no compensating benefits whatsoever and in the face of the fact that there has been in
76 the last few years a heavy increase in the cost of labor, material, supplies and every other element entering into the expense of operating said railroad company's lines.

In substantiation of the facts, conclusions and opinions set forth in the ten paragraphs immediately preceding, affiant states:

First. The concessions represented by said special rates on distillers' supplies, were first granted by said railroad company at a time when the distilling industry upon its lines in Kentucky was in a demoralized and precarious condition, because of their competition with the manufacturers of cheap whiskey and with blenders and rectifiers located on and north of the Ohio River. Said industry was carried on at small country points where primarily an abundant supply of pure water could be relied upon, and where it was expected the surrounding farms would furnish some portion of the grain necessary for distilling purposes. It was also expected that immunity from city taxes and other expenses incidental to manufacturing within the cities would tend to minimize the cost of production. In course of time, however, the inroads of the competition referred to, coupled with failure of grain crops, drouths and other unfor-seen happenings, placed said country distillers at a material disadvantage; in that they were frequently compelled to bring in from distant points grain, water, fuel and supplies of all kinds, the transportation charges upon which added materially to the cost of

their product. The few distillers who were making high grade special brands were not materially affected by the majority,
77 who were turning out the ordinary grades, found their markets being gradually closed to them by reason of the high cost of their supplies, and their competition with manufacturers of cheap whiskey and with blenders and rectifiers on and north of the Ohio River. In this situation said Louisville & Nashville Railroad Company, finding itself about to be deprived of the whiskey traffic which it had as a matter of business policy, labored to build up and maintain, made common cause with its distillers and voluntarily gave to them an unusually low scale of rates on their grain and supplies in the expectation and assurance that they would be withdrawn whenever the conditions changed for the better. For these reasons, said railroad company never guaranteed said rates or promised to protect them beyond the end of the current distilling season, and invariably thereafter said rates were restored, revised and modified from season to season as existing conditions seemed to require. Affiant states that as a result of said co-operative action, the distilling industry upon said railroad company's lines in Kentucky gradually recovered its footing, and that at the present time there are forty-eight of these country stations on its lines in Kentucky at which distilleries are located, namely:

Athertonville	Early Times	Levingood
Bardstown	Eminence	Loretto
Berry	Falmouth	Lotus
Bloomfield	Garnett	Memphis Junction
Bourbon	Gethsemane	Morgan
Boyd	Gilbert	Nazareth
Calvary	Greenbrier	New Hope

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Campbellsville	Haden	Poindexter
Chapeze	Hobbs	Robinson
Chicago	Hunters	St. Marys
Clermont	Jett	Samuels
Coon Hollow	Kellers	Shawhan
Crab Orchard	Kiserton	Silver Creek
Cynthiana	Lair	Silver Springs
Dants	Lancaster	Willow Springs
Deatsville	Lebanon	Withrow

Affiant is informed and believes that the disadvantages under which said industry labored in the beginning and for many years thereafter have entirely disappeared, and that it is not only no longer in need of the special rates which under the conditions then existing said railroad company gladly gave, but affiant believes and states that in the past few years enormous fortunes have been made from the distilling industry along its lines in Kentucky, and that there is no longer any reason or justification for extending to said industry lower rates on any articles necessary to the manufacture and shipment of whiskey, than the standard rates of said company

as applied to the same articles when intended for and devoted to other uses. During the time that said rates were in effect, affiant states that said railroad company was influenced solely by the representations of said distilling interests that without such assistance the distilleries could not be kept in operation, and by the certain knowledge that their closing down would take away from said railroad company, a large and fairly profitable traffic in the transportation of whiskey from said distilleries to the markets of consumption, affiant states that it was never contemplated or expected that said
79 rates would be perpetuated or even extended beyond the end of the current season; but affiant states that the said orders of the Railroad Commission of Kentucky, if enforced, will perpetuate said rates.

Second. Affiant states that the said special rates given on distillers' supplies prior to March 25, 1910, were materially lower in the majority of instances than the standard rates that were simultaneously charged from and to the same points on the same articles when intended for and devoted to other uses than the manufacture and shipment of whiskey, and in substantiation thereof prays leave to refer to Exhibit D to the bill of complaint herein. Affiant further prays leave to explain that said exhibit is incomplete, in that while it shows certain of the distillers' rates (indicated in black or typewritten figures) to have been greater than the standard rates (indicated in red ink figures), it failed to show that in such cases the distillers received the benefit of the lower rates and were not required to pay the rates indicated in the exhibit. Affiant states that at the time of its transportation, all the property described, whether for distillers' use or for other purposes, was charged for on basis of the standard rates indicated in red ink, and that the special distillers' rates were protected by refunding the excess upon the filing of a claim by the distiller, and the submission by him of evidence that the property had been used in the manufacture and shipment of whiskey, and for that reason no claims were ever filed and no refunds could be made where said standard rates were either the same
80 as or less than the distillers' rates indicated in black ink.

Affiant further states that said distillers' rates were frequently renewed from season to season without checking the same against and making alterations to correspond with the changes in the standard rates then current, and that that omission accounts for all those instances where said Exhibit D shows the distillers' rates to have been greater than the standard rates.

Affiant states that said Exhibit D shows that on barrel and box material in carloads, the distillers' rates were either as low as or one cent per 100 pounds less than the standard rates.

That on box and barrel material in less carload quantities, the distillers' rates were either as low as or from six to thirteen and one-half cents per 100 pounds less than the standard rates.

That on empty barrels in carloads, the distillers' rates were from four to sixteen cents per barrel less than the standard rates.

That on metal bottle caps, regardless of quantity, the distillers'

rates were either as low as or from four to thirteen cents per 100 pounds less than the standard rates.

That on bottle covers in carloads, the distillers' rates were either as low as or from six to thirteen and one-half cents per 100 pounds less than the standard rates.

That on bottle covers in less carload quantities, the distillers' rates were either as low as or from three to eight cents per 100 pounds less than the standard rates.

That on bottles in carloads, the distillers' rates were either as low as or from four to twelve and one-half cents per 100 pounds less than the standard rates.

81 That on bottles in ten carload quantities, the distillers' rates were either as low as or from two to fourteen cents per 100 pounds less than the standard rates.

That on empty boxes, regardless of quantity, the distillers' rates were either as low as or from six to twelve and one-half cents per 100 pounds less than the standard rates.

That on hoop iron in carloads, the distillers' rates were from five to twelve cents per 100 pounds less than the standard rates.

Affiant states that the rates shown on said Exhibit D in red ink and herein characterized as standard rates, were and are the rates charged by said railroad company upon the commodities named when intended for and devoted to any and all purposes other than the manufacture and shipment of whiskey, and are also the rates that have been charged on distillers' supplies since March 25, 1910.

Affiant states, therefore, that the direct and immediate effect of said orders, if enforced, will be to compel said railroad company to transport said articles for any and all persons, from and to the points named on basis of said distillers' rates irrespectively of the uses to which said articles are to be applied; that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified; that a large proportion of such movement is and will be devoted to uses other than the manufacture and shipment of whiskey and that to the extent that said articles are not applied to the manufacture and shipment of whiskey

82 said railroad company will be compelled to apply said distillers' rates thereon without receiving in any way, shape or form the considerations and benefits that induced it in the beginning and for a long time thereafter to give said rates to said distillers, and that the difference between the revenue accruing on said articles on basis of the just and reasonable standard rates of said railroad company and on basis of said distillers' rates ordered to be applied thereto by said orders of the Railroad Commission will amount to many thousands of dollars annually, and to that extent constitute irrevocable loss of revenue to said railroad company.

Third. Affiant states that the standard rates of said railroad company as applied to said articles when devoted to other uses than the manufacture and shipment of whiskey from and to the points specified, are made upon the same scale or basis that has been employed for a great many years by said railroad company in making its rates on said articles from and to other points in the State of Kentucky;

that the points of destination specified in said orders, sixteen in number, constitute but one-third of the country stations on said railroad company's lines in Kentucky at which distilleries are located, and constitute but a very small proportion of the number of destinations on said railroad company's lines in Kentucky to which there is and will continue to be a movement of traffic in said articles; that, therefore, the effect of said orders, if literally enforced, will be to compel said railroad company to give lower rates to the points of destination specified in said orders than to the numerous other points
83 of destination on its line in the State, and thus compel it to unjustly discriminate in favor of the sixteen points of destination embraced in said orders and against the numerous other points of destination not embraced therein. Affiant states that he is thoroughly familiar with the circumstances and conditions attending the movement of said articles in the State of Kentucky and existing at the various points of destination on said railroad company's lines in said State, and that in his opinion, based upon his knowledge and experience, no circumstance or condition exists by reason of which the sixteen points of destination embraced in said orders are morally or equitably entitled to a lower plane of rates on said articles than has been and is extended by said railroad company to the numerous points of destination not embraced in said order.

Affiant states that such unjust discrimination inevitably resulting from a literal enforcement of said orders, can only be avoided by said railroad company's reducing its standard rates on said articles all over the State to the level of the rates fixed in said orders to said sixteen points of destination embraced therein, and that as the movement of said articles is large and important, such action on the part of said railroad company would subject it to the loss of a considerable portion of its legitimate income without any compensating benefits whatsoever.

Fourth. Affiant states that all of the articles used by said distillers in the manufacture and shipment of whiskey are produced in other States as well as in Kentucky; that said distilling industry
84 has grown to such magnitude that it is no longer possible to secure all of said articles within the State of Kentucky; that for that reason a considerable volume of said articles has moved, is moving and will continue to move in interstate commerce from points in other States to said distillery points in the State of Kentucky; that there are no through rates on said articles from points outside the State to points within the State, and that, therefore, the transportation charges on such articles in interstate commerce are assessed by combining the rate from the point of origin to Louisville, Ky., to Covington, Ky., or to Newport, Ky. (at which point such shipments enter the State) with the rates from those points to the points of destination in Kentucky; that prior to the passage of the so-called Hepburn Act amending the Act to Regulate Commerce, said railroad company in assessing its rates made no distinction between intrastate and interstate commerce, but charged from Louisville, Ky., from Covington, Ky., and from Newport, Ky., to said distilling points in Kentucky, exactly the same rate upon shipments

coming from without the State as upon shipments originating at Louisville, Covington or Newport proper, and in affiant's opinion, no circumstance or condition exists by reason of which shipments of said articles originating at Louisville, Covington or Newport are entitled to be transported to said distilling points at less rates than are assessed from those points on interstate shipments coming from without the State. Affiant states that the Interstate Commerce Commission objected to said railroad company's charging less
85 rates upon shipments of said articles when intended for and devoted to the manufacture and shipment of whiskey than when intended for and devoted to other uses, holding that said railroad company had no right to dictate the uses to which the property transported should be put; that by reason of such objection said railroad company ceased to apply said distillers' rates, and thereafter charged on interstate shipments of said articles the higher or standard rates set forth in red ink on Exhibit D to the Bill of Complaint herein, because said railroad company could not stand the heavy losses of revenue that would have resulted from the application of said distillers' rates in the manner stipulated by said Interstate Commerce Commission, namely, by applying them without restriction to the shipments of said articles by any and all persons from and to the points in question; that thereafter, when interstate shippers complained of being discriminated against, affiant knew of no circumstance or condition existing to justify the difference between its intrastate and interstate rates on said articles, and was informed and believed that if said complaint were prosecuted to a conclusion the Interstate Commerce Commission would compel said interstate rates to be reduced to the level of said intrastate rates and be applied to all shipments of said articles whether intended for and devoted to the manufacture and shipment of whiskey or to other purposes; that thereupon the said distillers' rates were cancelled and withdrawn in their entirety and all shipments of said articles were thereafter charged for at the same rate whether intrastate or interstate
86 and whether intended for and devoted to the manufacture and shipment of whiskey or to other uses, and since March 25, 1910, said railroad company has not been guilty of any discrimination whatsoever in the application of its rates upon said articles. But affiant states that said orders, if enforced, will revive and renew the discrimination formerly existing and that in removing the same said railroad company will have no recourse but to reduce its interstate rates from and to the points therein specified to the level of the intrastate rates thus fixed by said Railroad Commission, and when that is done another unjustifiable discrimination will be created as between the points of destination embraced in said orders and numerous other points in the State.

As illustrative of the various discriminations that will arise from the enforcement of said orders, affiant prays leave to submit the following table of rates on corn, rye, malt and barley from Louisville to Lebanon and to stations intermediate to and beyond Lebanon

Corn, Rye, Malt, and Barley.

From Louisville, Ky., to—	Distance.	Rates now charged, both State & interstate, irrespective of use to which devoted.	Rates fixed in order of Ky. R. R. Com.	Rates which must be established, both State and interstate, to prevent unjust discrimination and violation of long & short haul principle.	Amount of reduction.
Strawberry, Ky.	6	5	..	..	..
Hoertz, Ky.	8	5	..	..	..
South Park, Ky.	10	5	..	..	..
Coral Ridge, Ky.	11	6	..	6	..
Brooks, Ky.	13	6	..	6	..
Tappan, Ky.	14	6	..	6	..
Hubers, Ky.	15	6	..	6	..
Gap in Knob.	16	7	..	6	1
Shepherdsville, Ky.	18	7	..	6	1
Salt River, Ky.	19	7	..	6	1
Bardstown Jct., Ky.	22	8	..	6	2
Belmont, Ky.	25	8	..	6	2
Lebanon Jct., Ky.	30	8	..	6	2
Smith's Switch, Ky.	33	9	..	6	3
Boston, Ky.	34	9	..	6	3
Beech Fork, Ky.	37	9	..	6	3
Nelsonville, Ky.	39	9	..	6	3
Lyons, Ky.	43	10	..	6	4
Athertonville, Ky.	44	10	..	6	4
New Haven, Ky.	45	10	..	6	4
Gethsemane, Ky.	48	10	6	6	4
New Hope, Ky.	50	10	..	6	4
Willow Spring, Ky.	51	10	..	6	4
Coon Hollow, Ky.	52	10	6	6	4
Dants, Ky.	53	10	..	6	4
Chicago, Ky.	55	10	6	6	4
Loretto, Ky.	57	11	6	6	5
Lofty, Ky.	61	11	..	6	5
St. Marys, Ky.	62	11	6	6	5
Lebanon, Ky.	67	12	6	6	6
Matson, Ky.	68	12	..	7	5
Amboy, Ky.	72	12	..	7	5
Penicks, Ky.	73	12	..	7	5
Wanda, Ky.	74	13	..	7	6
Rileys, Ky.	77	13	..	7	6
Gravel Switch, Ky.	79	14	..	7	7
Aliceton, Ky.	81	14	..	7	7
Brumfield, Ky.	84	14	..	8	6
Mitchellsburg, Ky.	86	14	..	8	6
Cozatt, Ky.	88	14	..	8	6
Parksville, Ky.	89	14	..	8	6
Alum Springs, Ky.	93	14	..	8	6
Shelby City, Ky.	96	14	..	8	6
Baughman's Mill, Ky.	103	14	..	9	5
Stanford, Ky.	104	14	..	9	5
Rowland, Ky.	105	14	..	9	5
Haden, Ky.	107	14	..	9	5
Gilbert, Ky.	110	14	..	9	5

87 Affiant states that if said railroad company should continue to charge its present rates to the stations between Matson and Gilbert, inclusive, the abrupt jump from 6 cents at Lebanon to 12 cents at Matson, only one mile further distant, would amount to unjust discrimination in favor of Lebanon and against Matson and provoke complaint and litigation on the part of the citizens of Matson, and said railroad company would be compelled to grade up its rates to said stations so as to prevent such abrupt increases. Affiant is of the opinion that said railroad company would not be able to charge more than 7 cents per hundred pounds to the stations between Matson and Aliceton, inclusive, or more than 8 cents per hundred pounds to the stations between Brumfield and Shelby City inclusive, or more than 9 cents per hundred pounds to the stations between Baughman's Mill and Gilbert, inclusive. Affiant calls particular attention to the figures shown in the column headed amount of reduction indicated; that beginning at Gap in Knob, 16 miles from Louisville, said railroad company would be compelled to make reductions in its existing standard rates, which affiant believes and affirms to be just and reasonable rates, from a minimum of 1 cent to a maximum of 7 cents per hundred pounds.

Fifth. Affiant states that said railroad company, in making its rate to and from its country stations such as those at which said distilleries are located, has always endeavored to apply the same rate in both directions on both state and interstate shipments, and that the enforcement of said orders will compel said railroad company to charge on corn, rye, malt and barley, for instance, 6 cents per hundred pounds from Louisville to Gethsemane, while charging 10 cents per hundred pounds from Gethsemane to Louisville; or charging 6 cents from Louisville to Coon Hollow and 10 cents from Coon Hollow to Louisville; of charging 6 cents from Louisville to Chicago, Ky., and 10 cents from Chicago, Ky., to Louisville; of 6 cents from Louisville to Loretto and 11 cents from Loretto to Louisville; of charging 6 cents from Louisville to Lebanon and 12 cents from Lebanon to Louisville. Affiant believes and says that such
88 wide differences between the rates in one direction compared with the rates in the reverse direction would provoke complaint and litigation and said railroad company would inevitably be compelled to make reductions, both its state and interstate rates into Louisville, Covington and Newport corresponding with the reductions made by the rates fixed in said orders from Louisville, Covington and Newport.

Sixth. Affiant states that said railroad company in making its rates to and from its country stations has always endeavored to avoid any distinction between corn, rye, malt, barley, wheat, oats, and other kinds of grain, but to charge the same rates upon any kind of grain, and that the limitation of the distillers' rates on grain to corn, rye, malt and barley was merely because of the fact that those were the only kinds of grain used by said distillers, and it was therefore not necessary to include other kinds. Affiant says that no circumstance or condition exists to justify such widely varying rates on corn, rye, malt, and barley as compared with wheat, oats, and

other kinds of grain, and that said orders of said Railroad Commission, if enforced, will compel said railroad company to make reductions in its rates on wheat, oats, and other kinds of grain corresponding with the reductions made by said orders on corn, rye, malt and barley in order to avoid complaint and litigation by the shippers and receivers of wheat, oats and other kind of grain from and to the points specified in said orders and to and from all other points on said railroad company's lines in Kentucky.

Seventh. Affiant states that said railroad company has al-
89 ways endeavored to avoid making any difference between the rates upon carload and less than carload quantities of grain to and from its country stations; that the limiting of said distillers' rates to carload quantities of corn, rye, malt and barley was not an indispensable condition imposed by said railroad company, but resulted from the fact that the grain of said distilleries invariably moved in carload quantities; and affiant states that said orders of said Railroad Commission, if enforced, will require said railroad company to differentiate between carload and less than carload quantities of corn, rye, malt and barley, and thus create an unjust discrimination, as a result of which said railroad company will, in affiant's opinion, be compelled to establish carload and less than carload rates on all kinds of grain between all points in Kentucky.

Eighth. Affiant is familiar with the rates charged by said railroad company and by other railroad companies in the territory south of the Ohio and Potomac rivers and east of the Mississippi River in which lies the greater proportion of said railroad company's lines upon the articles embraced in the orders of said Railroad Commission, and that the rates therein fixed from and to points specified upon said articles and particularly on corn, rye, malt and barley are absurdly, unjustly and unreasonably low and are substantially lower in comparison with the rates charged elsewhere in said territory by said railroad company and by other railroad companies. Affiant states that said rates so fixed on corn, rye, malt and barley are materially lower than existing anywhere in said territory and
90 are materially lower than said Railroad Commission, to-wit, in 1906, declared to be just and reasonable rates for the transportation of such commodities in Kentucky for the same or similar distances upon the lines of the Louisville & Nashville Railroad Co., the Illinois Central Railroad Co., the Southern Railway, the Nashville, Chattanooga & St. Louis Railway Co., and the Cincinnati, New Orleans & Texas Pacific Railway Co.

Affiant further states that the rates so fixed by said Railroad Commission are, in his opinion absurdly, unjustly and unreasonably low in and of themselves, for the service performed, because they are materially less than the rates on the said articles charged by said railroad company in other parts of Kentucky, and said railroad company has not in the past and is not earning now more than a fair and reasonable return from its business in said State of Kentucky. Affiant further states that said rates are absurdly, unjustly and unreasonably low in and of themselves because they are materially less than would be charged for the same service between the

same points or between other points by any existing means of transportation. Affiant further says that said rates are absurdly, unjustly and unreasonably low in and of themselves, because they are measured by the special rates which were given to distillers, whereas said Railroad Commission has given said rates wide and unrestricted application.

Ninth. Affiant states that the rates embraced in said orders have been fixed in absolute disregard of the fact that the laws of both the State of Kentucky and the United States forbid said railroad
91 company to charge more for a long haul than for a short haul over the same line in the same direction, the shorter being included within the longer distances, because the rate fixed in said orders on corn, rye, malt and barley, for instance, from Louisville to Lebanon, a distance of 67 miles is 6 cents whereas the rate from Louisville to Lofty, 61 miles over the same line in the same direction is 11 cents; to Dants, 53 miles 10 cents; to Willow Springs, 51 miles 10 cents; to New Haven, 45 miles, 10 cents; to Lyons, 43 miles 10 cents; to Nelsonville, 39 miles 9 cents and to Boston, 34 miles 9 cents per hundred pounds. Affiant knows of no circumstance or condition by reason of which said railroad company would be justified in charging upon said articles a less rate to any point of destination embraced in said order than to any intermediate station, and says that because of the laws aforesaid the railroad company would, therefore, be compelled to reduce the rates to all of its intermediate stations so as to be not higher than the rates fixed to the points of destination specified in said order, unless relieved therefrom by the order of said Commission and of the Interstate Commerce Commission.

Tenth. Affiant says that the movement of the articles embraced in said orders upon said railroad company's lines in Kentucky is large in volume, and that the reductions in rates that would, in affiant's opinion, inevitably follow the enforcement of said orders would deprive said railroad company of many thousands of dollars of revenue annually, which it would otherwise receive on
92 basis of its existing standard rates which are just and reasonable in all respects, and that such loss will be irrecoverable because said reduced rates will not increase the volume of traffic moving over said railroad company's lines and, therefore, said reduction in rates and loss of revenue will be unaccompanied by any compensating benefits whatsoever to said railroad company, notwithstanding there has been in the last several years a heavy and constantly growing increase in the cost of the service required of said railroad company in transporting said articles.

C. B. COMPTON.

Subscribed and sworn to before me this 24th day of September, 1910.

My Commission expires January 24, 1914.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

93 The affidavit of D. M. Goodwyn, referred to in the foregoing order and filed by complainant on Sept. 26, 1910, is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of D. M. Goodwyn.

Filed by Complainant in Court, September 26, 1910.

The affiant, D. M. Goodwyn, states that he is fifty-four (54) years old; resides in Louisville, Kentucky, and has been for over nine years General Freight Agent of the Louisville & Nashville Railroad Company, complainant herein; that he has had more than thirty years' experience in the railroad business, having served the Louisville & Nashville Railroad Company nearly sixteen years during that period as chief clerk in the general freight office, as assistant general freight agent and as general freight agent.

94 Affiant states that he is familiar with the freight rates of said company, and during his employment with it has been directly connected with the making of said freight rates; that, in the performance of his duties, he has been required to investigate, analyze, keep in touch with the many and various conditions surrounding and affecting the freight traffic of the company, and the various cities and communities served by it.

Affiant states that he is familiar with the subject matter of this proceeding, and that, by reason of his experience and employment, he is qualified to testify concerning the same.

Affiant states that, for a long time prior to March 25, 1910, and as far back as 1874, said railroad company made reduced rates to the owners of distilleries located along its lines of railroad in the State of Kentucky for the transportation of their raw materials and supplies, said reduced rates being made for the promotion, encouragement and increase of the manufacture and shipment of whiskey via its lines of railroad; said rates were materially less than the rates charged upon the same articles by said railroad company between the same points of origin and destination, when intended for and devoted to uses other than the manufacture and shipment of whiskey; that said rates were made from season to season, or year to year, without any promise or obligation whatever made by said railroad company to continue said rates beyond the expiration of

the season or year; that until January 1, 1899, said special rates were made upon the same general basis, but upon that date
95 said railroad company, because of the depressed conditions surrounding the whiskey trade at that time, made still lower rates for said distillers on their grain; that until the passage, by Congress, of the so-called Hepburn Act, amending the Act to Regulate Commerce, said special rates on distillers' supplies were applied to both interstate and intrastate shipments; that shortly thereafter the Interstate Commerce Commission objected to the application of said special rates upon interstate traffic, whereupon said railroad company cancelled and withdrew said special rates as to all interstate traffic, and thereafter, until March 25, 1910, applied them only to intrastate traffic within the State of Kentucky.

Affiant states that thereupon and thereby the said railroad company was likely to be forced into the attitude of discriminating between intrastate and interstate traffic of the same character, to the same points of destination; that investigation developed that the conditions which had justified the making of said special rates in the beginning no longer existed; that the manufacture of whiskey at points along its line in the State of Kentucky, and shipments therefrom, had become firmly established as a large and profitable business; that whatever reasons had originally prevailed in the establishment of said special rates for the promotion and encouragement of said distilleries no longer existed; that said special rates were not a matter of contract between said distillers, or any of them, and said railroad company, but were made and extended to said distillers as the voluntary act of said railroad company, for the reasons aforesaid.

96 Affiant states that as the conditions which originally governed in the making of said voluntary concessions to said distillers had disappeared and no longer existed, the said rates had become unjustly and unreasonably low and a discrimination against those persons who were paying the higher or standard rates of said railroad company upon said articles, when intended for and devoted to uses other than the manufacture and shipment of whiskey.

Affiant states that the rates charged and collected for the transportation of said articles on and after March 25, 1910, were and are the just and reasonable standard rates of said Louisville & Nashville Railroad Company; that they compare favorably with the rates charged and collected on the remaining portions of its Kentucky lines, and upon its lines in the numerous other States wherein said railroad company operates, and also with the rates charged and collected by other railroad companies for similar transportation in Kentucky and other States where the circumstances are substantially similar.

Affiant states that there was not then, and has not been since, any complaint made against the application of said higher or standard rates on said articles when intended for and devoted to uses other than the manufacture and shipment of whiskey, but that, soon

after the cancellation and withdrawal of the special rates on distillers' supplies, various distillers, who have for many years, been beneficiaries thereof, filed a complaint with the Railroad Commission of Kentucky against the Louisville & Nashville Railroad Company, praying among other things, for an order requiring and com-
97 pelling said railroad company to restore said special rates. Affiant is informed and believes that no shipper, receiver or user of said articles for purposes other than the manufacture and shipment of whiskey was a party to said complaint or took any part in the prosecution thereof before said Railroad Commission of Kentucky.

Affiant states that on the 10th day of August, 1910, said Railroad Commission of Kentucky entered certain orders among other things declaring the rates then charged for the transportation of said articles (which said rates were the standard rates of the Louisville & Nashville Railroad Company, as hereinbefore described) to be extortionate, unjust and unreasonable, and forbidding said railroad company to charge, collect or receive for the transportation of said articles rates in excess of those which said railroad company had, prior to March 25, 1910, applied to said articles when intended for and used in the manufacture and shipment of whiskey. Affiant states that said orders were intended to and did have effect of fixing rates to be charged by said railroad company for the transportation between the points specified therein of the articles named, without reference to the uses to which said articles were to be applied by the consignees thereof; and of commanding and requiring said railroad company to apply the said rates to the shipments of said articles made by any and all persons, whether manufacturers and shippers of whiskey, or otherwise, and wholly without regard to the uses and purposes to which said articles were to be applied by the consignees thereof.

98 Affiant states that the principal ground for the complaint filed before said Railroad Commission of Kentucky against the Louisville & Nashville Railroad Company because of the cancellation and withdrawal of the special rates on distillers' supplies, was the cancellation and withdrawal of the special rates on distillers' grain, such as corn, rye, malt and barley; that said orders of said Railroad Commission of Kentucky are arbitrary, unreasonable and unjust, especially as applied to said grain:

First. Because they are intended to compel said railroad company to transport said grain at rates materially less than its said standard rates, as demonstrated by the following table:

From Louisville, Ky., to—	Distance.	Rates as per Kentucky Railroad commission's order.	L. & N. R. R. Co.'s standard rates.
Chapeze, Ky.	24 miles	5 cents	8 cents
Clermont, Ky.	25 "	5 "	8 "
Hobbs, Ky.	27 "	5 "	8 "
Lotus, Ky.	29 "	5 "	8 "
Deatsville, Ky.	31 "	5 "	8 "
Samuels, Ky.	33 "	5 "	8 "
Hunters, Ky.	36 "	5 "	8 "
Bourbon, Ky.	37 "	5 "	8 "
Nazareth, Ky.	37 "	5 "	8 "
Withrow, Ky.	38 "	5 "	8 "
Bardstown, Ky.	39 "	5 "	8 "
Early Times, Ky.	42 "	5 "	9 "
Greenbrier, Ky.	45 "	5 "	9 "
Athertonville, Ky.	44 "	5 "	9 "
Gethsemane, Ky.	48 "	6 "	10 "
New Hope, Ky.	50 "	6 "	10 "
Willow Springs, Ky.	51 "	6 "	10 "
Coon Hollow, Ky.	52 "	6 "	10 "
Dants, Ky.	53 "	6 "	10 "
Chicago, Ky.	55 "	6 "	10 "
Loretto, Ky.	57 "	6 "	11 "
St. Marys, Ky.	62 "	6 "	11 "
Lebanon, Ky.	67 "	6 "	12 "
Crab Orchard, Ky.	115 "	10 "	15 "
Calvary, Ky.	73 "	9 "	15 "
Campbellsville, Ky.	87 "	11 "	15 "
Eminence, Ky.	40 "	6 "	7 "
Jett, Ky.	71 "	6 "	7 "
Silver Springs, Ky.	88 "	8 "	9 "
Bloomfield, Ky.	57 "	7 "	9 "
Kellers, Ky.	135 "	10 "	13 "
Cynthiana, Ky.	133 "	10 "	13 "
Lair, Ky.	130 "	10 "	13 "
Haden, Ky.	107 "	10 "	13 "
Gilbert, Ky.	110 "	10 "	13 "
Lancaster, Ky.	113 "	10 "	13 "
Silver Creek, Ky.	129 "	10 "	12 "

Second. Because said rates on grain, sought to be established by said Kentucky Railroad Commission, are materially less than the rates prescribed in an order of the Kentucky Railroad Commission made in June, 1906, and as alleged by said Commission at that time to have been fair, just and reasonable; said schedule of rates of June, 1906, having been set aside by the Supreme Court of the United States as being beyond the authority of the Railroad Commission of Kentucky to establish (see table).

99

From Louisville, Ky., to—	Distance.	Rates as per Kentucky railroad commission's order of August 10, 1910.	Rates as per Kentucky railroad commission's order of June, 1906.
Chapeze, Ky.	24 miles	5 cents	6 cents
Clermont, Ky.	25 "	5 "	6 "
Hobbs, Ky.	27 "	5 "	6 "
Lotus, Ky.	29 "	5 "	6 "
Deatsville, Ky.	31 "	5 "	7 "
Samuels, Ky.	33 "	5 "	7 "
Hunters, Ky.	36 "	5 "	7 "
Bourbon, Ky.	37 "	5 "	7 "
Nazareth, Ky.	37 "	5 "	7 "
Withrow, Ky.	38 "	5 "	7 "
Bardstown, Ky.	39 "	5 "	7 "
Early Times, Ky.	42 "	5 "	8 "
Greenbrier, Ky.	45 "	5 "	8 "
Athertonville, Ky.	44 "	5 "	8 "
Gethsemane, Ky.	48 "	6 "	8 "
New Hope, Ky.	50 "	6 "	8 "
Willow Springs, Ky.	51 "	6 "	8 "
Coon Hollow, Ky.	52 "	6 "	8 "
Dants, Ky.	53 "	6 "	8 "
Chicago, Ky.	55 "	6 "	8 "
Loretto, Ky.	57 "	6 "	8 "
St. Marys, Ky.	62 "	6 "	9 "
Lebanon, Ky.	67 "	6 "	9 "
Crab Orchard, Ky.	115 "	10 "	12 "
Calvary, Ky.	73 "	9 "	10 "
Campbellsville, Ky.	87 "	11 "	11 "
Eminence, Ky.	40 "	6 "	7 "
Jett, Ky.	71 "	6 "	10 "
Silver Spring, Ky.	88 "	8 "	11 "
Bloomfield, Ky.	57 "	7 "	8 "
Kellers, Ky.	135 "	10 "	13 "
Cynthiana, Ky.	133 "	10 "	13 "
Lair, Ky.	130 "	10 "	12 "
Haden, Ky.	107 "	10 "	11 "
Gilbert, Ky.	110 "	10 "	11 "
Lancaster, Ky.	113 "	10 "	12 "
Silver Creek, Ky.	129 "	10 "	12 "

Said Adam T. Siler, one of the defendants in this cause, was a member of said Railroad Commission of Kentucky in June, 1906, making said order, which was set aside, as aforesaid, by the Supreme Court of the United States.

Third. Because said rates on grain, sought to be estab-
100 lished by said orders of said Railroad Commission of Kentucky, are materially lower than the rates on grain for similar distances in the State of Kentucky charged by lines other than the Louisville & Nashville Railroad Company; and materially lower than the rates on grain for similar distances charged in the States of Tennessee, Alabama and Mississippi, by lines other than the Louisville & Nashville Railroad Company, against which said higher rates in Kentucky, Tennessee, Alabama and Mississippi, charged by said lines other than the Louisville & Nashville Railroad Company there has been no protest or complaint, so far as this affiant is informed and believes.

Fourth. Because said rates on grain sought to be established by said orders of said Railroad Commission of Kentucky are as low as, and, in many cases lower than, the rates charged on grain in the States of Indiana and Ohio, where grain is produced in very large quantities, forming a considerable percentage of the tonnage of the railroads in said States, and where the density of population and of tonnage is materially greater than in the State of Kentucky.

Fifth. Because the said orders, in seeking to compel said railroad company to apply on said articles between the points specified therein, rates which are materially less than applied thereto between other points in the State, will, if enforced, compel said railroad company to unjustly discriminate between different sections of the State, or else to apply the said rates, without distinction or discrimination, between all points on its lines in the State.

101 Sixth. Because the said orders seek to compel said railroad company to apply the said rates to the traffic in said articles for any and all persons shipping from and to the points specified, notwithstanding the fact that as between the said railroad company and the shippers, receivers and users of said articles for purposes other than the manufacture and shipment of whiskey, there is a complete absence of the conditions and considerations which induced said railroad company voluntarily to give said special rates in the beginning.

Seventh. Because the said orders, if enforced, will compel said railroad company to unjustly discriminate in favor of points on its lines in the State of Kentucky and against points on its lines in other States, or else to apply the said rates, without distinction or discrimination, between all points on its lines in all the States in which said railroad company operates, thus practically enabling said Railroad Commission of Kentucky to make the interstate rates of the Louisville & Nashville Railroad Company.

Eighth. Because said orders, if enforced, will compel said railroad company to charge less for a long haul than for a shorter haul over the same line in the same direction, in contravention of the laws of the State of Kentucky and of the United States, or else to apply said rates as maxima between all intermediate points upon interstate as well as intrastate traffic, unless relieved therefrom by the further order of said Commission and the order of the Interstate Commerce Commission.

102 Ninth. Because said orders, if enforced, will compel said railroad company to accept in other States, as well as in the State of Kentucky, and upon interstate, as well as intrastate traffic, rates which are unusually, unjustly and unreasonably low in and of themselves, and relatively, and which will not yield the said railroad company fair and reasonable compensation for the service performed, and will deprive said railroad company of the fair and reasonable return which it is entitled to earn upon the property it devotes to the public use in other States, as well as in the State of Kentucky, and upon interstate, as well as upon intrastate traffic.

Tenth. Because said orders, if enforced, will inflict upon said railroad company a considerable loss of revenue and income, in other

States, as well as in Kentucky, on traffic handled to and from points not occupied by the distilling interests, and in connection with the movement of traffic as to which there has been no complaint whatever about the rate; that said orders, if enforced, will result in the establishment of unreasonable, unfair, and unjust rates upon said railroad company's lines in Kentucky, as well as in other States.

D. M. GOODWYN.

Subscribed and sworn to before me, a Notary Public, in and for the County of Jefferson, State of Kentucky, this 23rd day of September, 1910.

[SEAL.]

G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

My Commission expires on the 24th day of January, 1914.

103 The affidavit of Defendant, Adam T. Siler, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of Defendant Adam T. Siler.

Filed by Defendants in Court September 26, 1910.

The affiant, A. T. Siler, states that he is a member of the Kentucky Railroad Commission, and as such is one of the defendants in this cause, and that he has been a member of said Commission for several years last past, and is now the chairman of said Commission. This affiant further states that the orders of said Commission complained of herein were made upon a formal complaint filed by certain persons and companies operating distilleries on the line of plaintiff's road and after the filing of answer by plaintiff herein, the defendant in said complaint, and after defendant upon due

104 notice as to the time and place of hearing was fully heard as to the reasonableness of the rates of which complaint was made and as to the reasonableness of the rates of which complaint is now made. Affiant states that he and the other members of said Commission carefully considered the testimony of numerous witnesses introduced by the parties, which was all the evidence offered, and

that defendant being represented by counsel was permitted to fully cross-examine the witness introduced by the complainants. Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force only a short time and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those fixed by the orders herein complained of. Affiant further states that the preponderance of evidence showed that the said complainants were the only persons who shipped over plaintiff's line to and from the several points in question the commodities to which said rates apply excepting only a very small quantity of said commodities shipped by other persons at some of said points, and that at some of said points the complainant operating a distillery at that point, was shown by uncontradicted evidence to be the only shipper of said commodities, while in no case did it appear that said commodities shipped to or from the point at which the distillery plant of any of the complainants was located, other than that shipped by such complainant, was considerable in quantity or value, or amounted to enough to affect the revenue of
105 plaintiff herein to any appreciable extent, or compared in quantity to the quantity shipped or received by the complainant whose distillery was located at said point. Affiant further states that the evidence did not show that the conditions which existed at the time of the hearing of said complaint differed from the conditions which existed during the years when plaintiff voluntarily charged and collected from the complainants the rates fixed by said Commission of which plaintiff is now complaining. Affiant further states that he and his co-defendants carefully considered all the evidence, and in good faith believed and now believe that it showed that the rates then charged by the plaintiff were extortionate, and that the rates fixed by the Commission were then and are now just and reasonable rates. Affiant further states that said Commission has never threatened to institute any criminal prosecution against plaintiff herein for a violation of either of the orders complained of herein, and that he has never made any such threat and that he does not believe that any member of said Commission has ever done so. Affiant further states that it is not his purpose or intention as a member of said Commission to take any step whatever looking to the criminal prosecution of plaintiff for a violation of either of said orders, or to recommend an indictment for a violation of said orders, unless plaintiff should continue to violate said orders after their validity has been determined by some competent court. Affiant further states that he is advised and believes that the statutes of Kentucky afford ample oportunity to test the validiy of said orders in the civil courts, and that it is his purpose and he believes that it is
106 the purpose of his co-defendants and of said Commission to test the validity of said statute in the civil courts. Affiant further states that he is advised and believes that all violations of any order of said Commission fixing rates prior to the first conviction for a violation of said order constitute but a single offense, and that as a member of said Commission it is his purpose and in-

tention to insist upon that construction of the statute. Affiant further states that the plaintiff herein did not by its answer filed to said complaint deny that the several amounts for which reparation was asked represented the amounts collected by plaintiff in excess of the rates which were for many years collected by plaintiff, and which were finally found by said Commission to be just and reasonable rates.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler, this — day of September, 1910.

My commission expires Feb. 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

107 The affidavit of Lawrence B. Finn, Defendant, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:—

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of Defendant Lawrence B. Finn.

Filed by Defendants in Court, September 26, 1910.

The affiant, Lawrence B. Finn, states that he is a member of the Kentucky Railroad Commission and as such is one of the defendants in this cause, and that he was a member of said Commission when the orders complained of herein were filed. This affiant further states that said orders of said Commission were made upon a formal complaint filed by certain persons and companies operating distilleries on the line of plaintiff's road, and after the filing of answer by plaintiff herein, the defendant in said complaint, and after defendant upon due notice as to the time and place of
108 hearing was fully heard as to the reasonableness of the rates of which complaint was made and as to the reasonableness of the rates of which complaint is now made. Affiant states that he and the other members of said Commission carefully considered the testimony of numerous witnesses introduced by the parties, which was all the evidence offered, and that defendant being represented by counsel was permitted to fully cross-examine the witnesses introduced by the complainants. Affiant further states that the uncontradicted evi-

dence showed that the rates of which the complainants were complaining had been in force only a short time and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those fixed by the orders herein complained of. Affiant further states that the preponderance of the evidence showed that the said complainants were the only persons who shipped over plaintiff's line to and from the several points in question the commodities to which said rates apply excepting only a very small quantity of said commodities shipped by other persons at some of said points, and that at some of said points the complainant, operating a distillery at that point, was shown by uncontradicted evidence to be the only shipper of said commodities, while in no case did it appear that said commodities shipped to or from the point at which the distillery plant of any of the complainants was located, other than that shipped by such complainant, was considerable in quantity or value, or amounted to enough to affect the revenue of plaintiff herein to any appre-
109 ciable extent, or compared in quantity to the quantity shipped or received by the complainant whose distillery was located at said point. Affiant further states that the evidence did not show that the conditions which existed at the time of the hearing of said complaint differed from the conditions which existed during the years when plaintiff voluntarily charged and collected from the complainants the rates fixed by said Commission of which complainant is now complaining. Affiant further states that he and his co-defendants carefully considered all the evidence, and in good faith believed and now believe that it showed that the rates then charged by the plaintiff were extortionate, and that the rates fixed by the Commission were then and are now just and reasonable rates. Affiant further states that said Commission has never threatened to institute any criminal prosecution against plaintiff herein for a violation of either of the orders complained of herein, and that he has never made any such threat and that he does not believe that any member of said Commission has ever done so. Affiant further states that it is not his purpose or intention as a member of said Commission to take any step whatever looking to the criminal prosecution of plaintiff for a violation of either of said orders, or to recommend an indictment for a violation of said orders, unless plaintiff should continue to violate said orders after their validity has been determined by some competent court. Affiant further states that he is advised and believes that the statutes of Kentucky afford ample opportunity to test the validity of said orders in the civil courts,
110 and that it is his purpose and he believes that it is the purpose of his co-defendants and of said Commission to test the validity of said statute in the civil courts. Affiant further states that he is advised and believes that all violations of any order of said Commission fixing rates prior to the first conviction for a violation of said order constitute but a single offense, and that as a member of said Commission it is his purpose and intention to insist upon that construction of the statute. Affiant further states that the plaintiff herein did not by its answer filed to said complaint deny that the

several amounts for which reparation was asked represented the amounts collected by plaintiff in excess of the rates which were for many years collected by plaintiff, and which were finally found by said Commission to be just and reasonable rates.

LAWRENCE B. FINN,
R. R. Com., First Ky. Dis.

Subscribed and sworn to before me by Lawrence B. Finn, this 26th day of September, 1910. My commission expires February 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

111 The affidavit of W. A. Miller, referred to in the foregoing order and filed by defendants on Sept. 26, 1910, is in words and figures as follows, viz:—

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of W. A. Miller.

Filed by Defendants in Court, September 26, 1910.

Affiant, W. A. Miller, says that he is Vice-President of Wright & Taylor, a corporation that was one of the complainants before the Kentucky Railroad Commission in the case of Greenbrier Distillery Company v. Louisville & Nashville Railroad Company in which case said Commission, after hearing evidence and arguments, entered certain orders on August 10, 1910, which orders are sought to be enjoined in this proceeding.

Affiant says that the rates as fixed by said Commission, by the orders aforesaid, had for many years prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in
112 said orders to and from distilleries located at the points named in said orders; that there has not been in the past nor is there now any movement or shipments of the commodities named in said orders between said points other than the shipment of said commodities to and from the distilleries located at said points sufficient in quantity for the rates thereon to materially affect the revenue of the said Louisville & Nashville Railroad Company derived from the transportation of said commodities between said points.

Affiant says that if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the

points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers that all of the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned and that the value of all of said distilleries will be largely depreciated.

W. A. MILLER.

Subscribed and sworn to before me in Louisville, Jefferson County, Kentucky, by W. A. Miller, this 24th day of September, 1910. My Commission expires January 24, 1914.

[SEAL.] J. V. NORMAN,
Notary Public in and for Jefferson County, Kentucky.

113 The affidavit of R. H. Edelen, referred to in the foregoing order and filed by defendants on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Affidavit of R. H. Edelen.

Filed by Defendants in Court, September 26, 1910.

Affiant, R. H. Edelen, says that he is President of the Mattingly & Moore Distillery Company, a corporation that was one of the complainants before the Kentucky Railroad Commission in the case of Greenbrier Distillery Company v. Louisville & Nashville Railroad Company in which case said Commission, after hearing evidence and arguments, entered certain orders on August 10, 1910, which orders are sought to be enjoined in this proceeding.

Affiant says that the rates as fixed by said Commission, by the orders aforesaid, had for many years prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in
114 said orders to and from distilleries located at the points named in said orders; that there has not been in the past nor is there now any movement or shipments of the commodities named in said orders between said points other than the shipment of said commodities to and from the distilleries located at said points sufficient in

quantity for the rates thereon to materially affect the revenue of the said Louisville & Nashville Railroad Company derived from the transportation of said commodities between said points.

Affiant says that if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers that all of the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned and that the value of all of said distilleries will be largely depreciated.

R. H. EDELEN.

Subscribed and sworn to before me in Louisville, Jefferson County, Kentucky, by R. H. Edelen this 24th day of September, 1910. My Commission expires January 24, 1914.

[SEAL.] J. V. NORMAN,
Notary Public in and for Jefferson County, Kentucky.

115 The Demurrer of defendants to whole Bill, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Demurrer to Whole Bill.

Filed by Defendants in Court, September 26, 1910.

The Joint and Several Demurrer of Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Above Named Defendants, to the Bill of Complaint of Louisville & Nashville Railroad Company, the Above Named Complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

1. That it appears by plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants.

116 2. That said bill of complaint of the complainant is wholly without equity.

3. That it appears by said bill that the same is exhibited by the said complainant against these defendants for several distinct matters and causes, and that said bill is multifarious.

4. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said bill.

Wherefore these defendants respectively demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAS. BREATHITT, *Att'y Gen'l;*
JNO. F. LOCKETT, *Ass't Att'y Gen'l;*
McCHORD, HINES & NORMAN,
Attorneys for Defendants.

Adam T. Siler makes solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 26th day of September, 1910.

My Commission expires February 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. F. LOCKETT,
Of Counsel for Defendants.

117 The Demurrer of defendants to part of Bill, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,

vs.

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Demurrer to Part of Bill.

Filed by Defendants in Court September 26, 1910.

The Joint and Several Demurrer of Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Above Named Defendants, to a Part of the Bill of Complaint of Louisville & Nashville Railroad Company, the Above Named Complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur to so much and such part of the
118 bill as seeks that these defendants may answer and set forth whether a certain order of the Kentucky Railroad Commission made on August 10, 1910, awarding reparation to the Greenbrier Distillery Company and certain other persons and companies on account of extortionate freight charges shall be put into effect and enforced, and to so much and such part of said bill as prays for an injunction restraining these defendants from putting said order into effect, and shows:

1. That it appears by the complainant's own showing by the said bill that it is not entitled to any relief on account of the matters set up in said part of said bill, and especially is not entitled to the said relief prayed for.

2. That said part of said bill is wholly without equity.

3. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said part of said bill.

Wherefore and for divers other errors and imperfections appearing in the said bill, these defendants humbly pray the judgment of this Honorable Court whether they shall be compelled to make any answer to such part of said bill as is so demurred unto as aforesaid, these defendants being unable by reason of the fact that the bill intermingles its several complaints to more specifically set out the parts of the bill to which this demurrer relates.

JAMES BREATHITT,
Att'y Gen'l of Ky.;
JNO. F. LOCKETT,
Ass't Att'y Gen'l of Ky.;
McCHORD, HINES & NORMAN,
Counsel for Defendants.

119 Adam T. Siler makes solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 26th day of September, 1910.

My commission expires February 4, 1912.

[SEAL.] LOUISE B. SORG,
Notary Public in and for Franklin County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

JNO. F. LOCKETT,
Of Counsel for Defendants.

120 On a day following, to wit: on the 3rd day of November, A. D., 1910, an order was made and entered in said cause, which said order is in words and figures as follows, viz:—

United States Circuit Court, Eastern District of Kentucky, Frankfort Division.

THURSDAY, *November 3rd, A. D.* 1910.

Court Met Pursuant to Adjournment:

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER et al., Defendants.

This cause coming on to be heard on the demurrers of the defendants to the bill of complain*ant* and the application of the complainant for an interlocutory injunction against the defendants, and it appearing to the court that notice of this hearing has been given for more than five days to the governor and to the attorney
121 general of the State of Kentucky, and to the defendants in this cause, and so admitted by counsel for both complainant and defendants in open court:

Came the complainant by Albert S. Brandeis and H. L. Stone, its attorneys, and defendants by McChord and Hines and John F.

Lockett, their attorneys, and the said John F. Lockett also appearing as assistant attorney general for the attorney general.

Whereupon, complainant by attorneys, tendered and offered to file an amended bill of complaint herein, which is now ordered filed, and on motion of defendants, consented to by complainant, the defendants are hereby allowed to amend their demurrers so as conform to the bill of complaint as amended, and same are hereby ordered filed.

Whereupon, the demurrers of defendants to the bill of complaint as amended, and the motion of complainant for an interlocutory injunction herein, were argued by counsel, and are now submitted, and the court not being fully advised, takes time.

On motion of parties, both complainant and defendants, they are given time until and including November 25th next, to prepare and file briefs herein.

122 Said Amended Bill of Complaint, referred to in the foregoing order and filed on the 3rd day of November A. D., 1910, is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

Louisville & Nashville Railroad Company, Complainant,
vs.
Adam T. Siler et al., Defendants.

Amended Bill of Complaint.

Filed in Court November 3, 1910.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, the Louisville & Nashville Railroad Company, brings this, its amended bill of complaint, against Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, constituting the Railroad Commission of the State of Kentucky, defendants, and thereupon states:

XVIII.

That, including the lines of railroad owned and operated by it, as stated in its original bill of complaint herein, it owned and operated on August 10, 1910, and now owns and operates the following lines of railroad, situated in fifty-seven (57) counties in the State of Kentucky, to-wit:

1-*a*	From—	To—		
L. & N.—Main stem	Louisville, Ky.	State Line, Ky.-Tenn.	139.91	
Lebanon Branch	Lebanon Jct., Ky.	Sinks, Ky.	107.28	
Cumberland Valley Division	Corbin, Ky.	State Line, Ky.-Tenn.	46.94	
*Cincinnati Division	Louisville, Ky.	State Line, Ky.-Ohio	109.63	
*Cincinnati Division	E. Louisville, Ky.	South Louisville, Ky.	4.15	
A. Street Connection	Transfer Jct., Ky.	A Street Jct., Ky.	.76	
Memphis Line	Memphis Jct., Ky.	State Line, Ky.-Tenn.	46.46	
†Henderson Division	State Line, Ky.-Tenn.	State Line, Ky.-Ind.	98.23	
Knoxville Division	Corbin, Ky.	State Line, Ky.-Tenn.	30.03	
Kentucky Division	Covington, Ky.	Corbin, Ky.	185.07	
Louisville & Atlantic Rd.	Versailles, Ky.	Beattyville Jct., Ky.	101.10	
				869.56
1-*b*				
Chesapeake & Nashville Branch	State Line, Ky.-Tenn.	Scottsville, Ky.	10.08	
Greensburg Branch	C. & O. Jct., Ky.	Greensburg, Ky.	30.90	
Bardstown & Springfield Branch	Bardstown Jct., Ky.	Springfield, Ky.	37.44	
Knoxville Division branches	Wilton Jct., Ky.	Lorena, Ky.	3.97	
	Saxton, Ky.	State Line, Ky.-Tenn.	3.19	
	Jellico, Tenn.-Ky.	Halsey, Ky.	8.11	
	Maxie, Ky.	Kensee, Ky.	1.78	
Cumberland Valley Division branches	Orby, Ky.	Harrison, Ky.	17.13	
	Wenrick, Ky.	Straight Creek, Ky.	2.01	
Middlesboro Rd.	Middlesboro, Ky.	State Line, Ky.-Tenn.	5.23	
	Stony Fort Jct., Ky.	Logmont, Ky.	6.08	
	Logmont, Ky.	Elwood, Ky.	2.87	
Clarksville & Princeton Branch	State Line, Ky.-Tenn.	Gracey, Ky.	23.17	
Cincinnati Division Branch	Louisville, Ky.	Pipe Line Ave., Ky.	3.46	
Lexington Branch	La Grange, Ky.	Lexington, Ky.	67.00	
	Shelbyville, Ky.	Christiansburg, Ky.	8.51	
Shelby Branch	Anchorage, Ky.	Shelbyville, Ky.	18.58	
Bloomfield Branch	Shelbyville, Ky.	Bloomfield, Ky.	26.72	
Kentucky Division Branch	Ft. Estill Jct., Ky.	Rowland, Ky.	30.47	
Morganfield Branch	Madisonville, Ky.	Providence, Ky.	16.10	

Louisville & Atlantic R. R.	Heidelburg, Ky.	Idamay, Ky.	3.00	
Frankfort & Cincinnati R'y	Frankfort, Ky.	Paris, Ky.	40.10	
				365.90
2				
Morganfield & Atlanta Rd.	Providence, Ky.	**Morganfield, Ky.**	25.33	
Maysville & Lexington R'y—N. Division	Maysville, Ky.	Paris, Ky.	49.48	
Maysville & Lexington R'y—Sou. Div.	Paris, Ky.	Lexington, Ky.	17.86	
Owensboro & Nashville R'y	Owensboro, Ky.	Adairville, Ky.	83.46	
Pine Mountain Rd. East	Yingling, Ky.	Chadman, Ky.	2.14	
	Savoy, Ky.	**Gatliff, Ky.**	18.60	
Pine Mountain Rd. West	Nevisdale, Ky.	Packard, Ky.	2.49	
‡Central Transfer R'y & Storage Co.	In city of Louisville, Ky.		.....	
Madisonville, Hartford & Eastern Rd.	Reinecke Jct., Ky.	Ellmitch, Ky.	55.49	
				254.85
3				
Glasgow R'y	Glasgow Jct., Ky.	Glasgow, Ky.	10.50	
Elkton & Guthrie Rd.	Elkton, Ky.	Guthrie, Ky.	10.92	
				21.42
4				
Southern R'y	State Line, Tenn.-Ky.	Fonde, Ky.	2.09	
Louisville & Interurban R'y	Pipe Line Ave., Ky.	Prospect, Ky.	7.70	
Cov. & Cinti. Elev. Rd. & Tfr. & Brg. Co.	State Line, Ky.-Ohio	Covington, Ky.	1.58	
Providence Coal Co.	Tracks at Providence, Ky.		.30	
L., H. & St. L. R'y	Tracks at Owensboro, Ky.		.26	
Chesapeake & Ohio R'y	Tracks at Lexington, Ky.		.20	
Lexington Union Station Co.	Tracks at Lexington, Ky.		.22	
Straight Creek Coal & Coke Co.	Straight Creek, Ky.	**Blanche, Ky.**	3.89	
				16.24
			Total	1,527.97

* Includes Newport & Cincinnati Bridge in Kentucky ..... 0.54 of a mile
† Includes Henderson Bridge in Kentucky ..... 0.47 of a mile
‡ 0.67 miles in length operated as side track; owned jointly with Southern Railway Company.

124 Complainant states that the average total mileage of the railroad lines owned and operated by it during the year ended June 30, 1910, in Kentucky and other States and on August 10, 1910, was and is now..... 4,590.55

XIX.

Complainant further states that by its charter granted by the Legislature of Kentucky, entitled "An Act to Charter Louisville & Nashville Railroad Company," approved March 5, 1850, and the amendments thereto, it was and is authorized and empowered to charge and collect, for the transportation of goods, merchandise, and property of any kind whatever on or over its railroad lines in Kentucky, any sum not exceeding the following rates, to-wit:

For every one hundred pounds transported over twenty miles and under fifty miles three and one-half ($3\frac{1}{2}$) mills for each mile; for all other transportation of freight and property, not exceeding four (4) mills for each mile per hundred pounds; for transporting single packages any distance weighing not less than one hundred pounds, twenty-five (25) cents; for transporting live stock, poultry, furniture, feathers, wool rags, and other like light bulky articles, weighing not more than sixty-five (65) pounds to the cubic foot, not exceeding fifteen (15) per cent above the rates allowed to be charged for heavy merchandise. Gold, silver, bullion, money of all kinds, and mails are exempted from the rates established in its said

125 charter, and complainant's board of directors is thereby authorized to contract especially therefor. For the transportation of passengers complainant is authorized by its charter to charge not exceeding four (4) cents per mile for each passenger, with his baggage weighing not more than forty (40) pounds.

The said maximum rates, which complainant is authorized and empowered to charge and collect for its transportation services on and over its lines in Kentucky are set out, in part, in Section eighteen (18) of its said original charter from the Legislature of Kentucky, and, in so far as they are not set out in that section, complainant is authorized and empowered by and expressly referred to in that section to charge and collect the same maximum rates as were, at the date of the passage and approval of its said original charter, authorized to be charged and collected by and on the railroad from Lexington to Frankfort, Kentucky, which maximum rates were on March 5, 1850, set out in Section Twenty (20) of the act of the Legislature of Kentucky, entitled "An act to incorporate the Lexington & Frankfort Railroad Company," approved February 28, 1848, and said maximum rates so provided for in Section Twenty (20) of the last mentioned act referred to and made part of complainant's said original charter, were in full force and effect, and charged and collected, upon said Lexington & Frankfort Railroad at the date of the passage and approval of complainant's said original charter on March 5, 1850, and complainant's charter

authority, powers, grants, rights and privileges to charge

126 and collect said maximum rates for its transportation lines in Kentucky have been ever since and are now in full force and effect.

Complainant states that by reason of these provisions in its charter there was a valid contract made, which still subsists between the Commonwealth of Kentucky and complainant, whereby complainant was and is authorized and granted the right and privilege to charge and collect from its patrons, on and over the lines of railroad it owns and operates in Kentucky, rates for the transportation of goods, wares, merchandise, property and freight and passengers, respectively, not exceeding the maximum rates hereinabove set out and provided in its said original charter and the amendments thereto.

Complainant states that all the lines of railroad owned and operated by it, as set forth in Paragraph III of its original bill of complaint and Paragraph XVIII of this, its amended bill of complaint, were constructed and acquired by complain-t upon the faith of said contract embodied in the charter provisions aforesaid, which have never been repealed by any act, public or private, of the General Assembly of the Commonwealth of Kentucky.

The complainant states while it is true that by a resolution of its Board of Directors, adopted July 11, 1902, complainant duly accepted the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891, and the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto, a copy of which resolution was filed with the Secretary of the State of
127 Kentucky, and thereby and thereafter the said contract (with respect to the maximum freight and passenger rates it is entitled to charge and collect on its said lines of railroad) between complainant and the Commonwealth of Kentucky became and is now no longer irrevocable or irrepealable, nevertheless, said contract remains intact and has never been revoked or repealed by any act of the Legislature of the State of Kentucky, and the obligation thereof was on August 10, 1910, the date of the making by the defendants of the orders herein complained of and is still unimpaired and in full force and effect and beyond the power of the defendants constituting the Railroad Commission of Kentucky to set aside, annul or impair in any manner.

Complainant states that the rates it had in force and effect on the commodities between the points described in its original bill, effective on and after March, 25, 1910, which defendants held to be extortionate, and prescribed the rates complained of in lieu thereof, were less than the said maximum rates it was and is allowed by its charter to charge and collect as legal, just and reasonable for the transportation services performed, or to be performed, and, therefore, said order of the defendants, constituting said Commission, is null and void, and operates to deprive complainant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Complainant further states that it has never charged or collected on any of the lines of railroad it owned or operated in Kentucky, for the transportation of freight, any rate or rates in excess
128 of the minimum rates prescribed, allowed and authorized by its charter as aforesaid.

The complainant further avers that the defendants claim that the Act of March 10, 1900, known as the McChord Act, confers upon them as the Railroad Commission of Kentucky power and authority to declare the rates of complainant for the transportation of freight on and over its lines in said State extortionate, although they do not exceed the maximum rates provided for in its charter, and notwithstanding its charter, in that respect, has not been repealed, and also power and authority to prescribe lower rates in lieu thereof, and to subject complainant and its officers, agents, and employés to criminal prosecution and heavy, repeated, and cumulative penalties for charging, collecting or receiving a greater or higher rate, toll or compensation for like services thereafter rendered than that made or fixed by the defendants, constituting said Commission.

The complainant states that said McChord Act so construed and the orders of August 10, 1910, made by the defendants, as such Commission, in pursuance thereof, and herein complained of, impair the obligation of the contract made and existing between complainant and the State of Kentucky, whereby complainant is entitled to charge, collect and receive rates on freight in said State not in excess of the maximum rates aforesaid upon the same kind of commodities, transported for the same distances stated in its charter, so long as said contract is not revoked and its said charter pro-
129 vision remains, as it does, unrepealed, by the Legislature of said State, which impairment is in violation of that provision of Sub-section one (1), Section ten (10), Article one (1) of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

XX.

Cotaplainant further states that the maximum rates prescribed by the order made by the defendants, constituting the Railroad Commission of Kentucky, of August 10, 1910, herein complained of, upon corn, rye, malt, barley and other articles used in the manufacture and shipment of whiskey on and over complainant's lines from Louisville, Covington, and Newport, Kentucky, respectively, to the sixteen stations, respectively, named and set out in said order, are arbitrary, unjust, unreasonable, discriminatory and illegal because of the following facts, among other grounds, to-wit:

1. The defendants by their said order seek to compel the complainant to perpetuate and make permanent the special rates put in temporarily by complainant from season to season upon said commodities to be used as and for the purposes aforesaid from three points, respectively, to the sixteen points, respectively, named in said order, notwithstanding the conditions in consideration of which complainant therefore granted said exceptional rates in the beginning had disappeared and ceased to exist long prior to March 25, 1910.

130 2. The defendants, by their said order, seek to compel complainant to apply the said low and unremunerative rates put in for said special purposes to the traffic in said commodities of any and all persons shipping from Louisville, Covington, and

Newport, respectively, to the points named in said order, respectively, thus giving to said special rates a much broader application than was ever voluntarily given thereto by complainant, notwithstanding the fact that as between complainant and the shippers, receivers and users of said articles of freight for other purposes than the manufacture and shipment of whiskey there was and is a complete absence of the conditions and considerations, which induced complainant to voluntarily grant said special rates in the beginning and afterward to continue them in effect from season to season.

3. The said special rates upon said commodities and articles from the three points, respectively, to the sixteen points, respectively, named in said order, are materially less than are applied thereto between other points on complainant's lines in Kentucky, and if enforced, would make an unjust discrimination between different sections of the State, or else compel the application of said special and low rates, without distinction or discrimination, to the transportation of said commodities and articles between all points on its lines in the State of Kentucky.

4. The enforcement of the rates prescribed in said order will bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points
131 in other States and transported between the same points in Kentucky, thus placing a burden on interstate commerce, or else to apply the said rates without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.

5. The said order, if enforced, will compel complainant to charge materially less rates in one direction than in the other direction between the same points, on both intrastate and interstate traffic of the same kind, or else to apply said specially low rates, without distinction or discrimination, in both directions between all points.

6. The said order, if enforced, will require complainant to charge less rates upon corn, rye, malt, and barley than upon wheat, oats, and other kinds of grain, whereas complainant has always endeavored to charge and collect the same rates upon all kinds of grain, or else complainant will be compelled to apply the rates specified in said order to all kinds of grain upon both intrastate and interstate shipments.

7. If enforced, said order will compel complainant to charge and collect less rates per 100 pounds upon carload quantities than less than carload quantities of grain, whereas complainant has always endeavored to charge and collect the same rate upon carload as upon less than carload quantities of grain or else complainant will be compelled to establish less rates for carload than for less than carload quantities of grain upon both intrastate and interstate traffic.

8. The enforcement of said order will compel complainant
132 to accept upon interstate as well as intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, and which will not yield to complainant a fair or reasonable compensation for the service performed, and will deprive complainant without due process of law of the fair and rea-

sonable return, to which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The enforcement of the rates fixed by said order would compel complainant to charge and receive a less rate or compensation for the transportation of property of like kind, both intrastate and interstate traffic, for a longer haul than for a shorter haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States, unless relieved therefrom by the further order of the Railroad Commission of said State, and the order of the Interstate Commerce Commission.

10. The enforcement of the rates prescribed by said order will inflict upon complainant a direct annual loss of revenue and income to at least the extent of the sums stated in its original bill of complaint, upon the transportation of both intrastate and interstate traffic in Kentucky, and a loss many times larger as the necessary result and consequence of being compelled to put into force and
133 effect the rates in accordance with said order on the commodities between the points named therein, and between other points on its lines in Kentucky, with no compensating benefits whatsoever, and in the face of the fact that there has been in the last few years a very heavy increase in the cost of labor, materials, supplies, and every other element or factor entering into the expenses of operating complainant's lines of railroad in, as well as out, of the State of Kentucky.

Wherefore, the complainant prays as in its original bill of complaint, and for all other relief to which it in equity may appear to be entitled.

ALBERT S. BRANDEIS,
WILLIAM G. DEARING,
HENRY L. STONE,
Attorneys for Complainant.

STATE OF KENTUCKY,
Jefferson County:

Personally appeared before me, G. W. B. Olmstead, a notary public, duly commissioned, qualified and acting in and for the county and State aforesaid, A. R. Smith, who, being duly sworn by me, deposes and says:

That he is the Third Vice President of the Louisville & Nashville Railroad Company, the complainant in the foregoing bill, and knows the contents thereof; that the facts therein stated as of complainant's own knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

A. R. SMITH.

134 Subscribed and sworn to before me this 2nd day of November, A. D. 1910.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 24th day of January, A. D. 1914.

[SEAL.] G. W. B. OLMSTEAD.
Notary Public, Jefferson County, Ky.

135 Said Demurrer to whole Bill as Amended, referred to in the foregoing order and filed on the 3rd day of November, A. D. 1910, is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Demurrer to Whole Bill as Amended.

Filed in Court November 3, 1910.

The joint and several demurrer of Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, above named defendants, to the bill of complaint of Louisville & Nashville Railroad Company, the above named complainant, as amended by complainant's amended bill filed herein on the 3rd day of November, 1910.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same
136 are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

1. That it appears by plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants.

2. That said bill of complaint of the complainant is wholly without equity.

3. That complainant has an adequate remedy at law.

4. That it appears by said bill that the same is exhibited by the said complainant against these defendants for several distinct matters and causes, and that said bill is multifarious.

5. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said bill.

Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and

things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAMES BREATHITT, *Att'y Gen'l.*
JOHN F. LOCKETT, JR.,
Ass't Att'y Gen'l.
McCHORD, HINES & NORMAN,
Attorneys for Defendants.

Adam T. Siler makes a solemn oath and says that he is one
137 of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 5th day of November, 1910.

MINNIE MURPHY,
Notary Public in and for —— County, Kentucky.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

EDWARD W. HINES.

158 On a day following, to wit: on the 9th day of January, A. D., 1911, an order was made and entered herein, which said order is in words and figures as follows, viz:—

MONDAY, *January* 9, 1911.

Court met pursuant to adjournment.

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance on the hearing and determination of the application for an interlocutory injunction and all questions arising in this case.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD CO., Complainant,
vs.
ADAM T. SILER et al., Defendants.

This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, the court files its written opinion herein.

Said opinion filed January 9, 1911, referred to in the foregoing order, is in words and figures as follows, viz:—

139 In the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The complainant brings its bill in equity against defendants as individuals, and also as officials composing the railroad commission of Kentucky. The complainant was organized as a corporation under a special charter granted by the State of Kentucky; it is invested with the usual powers of a steam railroad company, and is maintaining and operating a number of lines of railroad comprising a main stem and various divisions and branches within the State which are described in the bill by names and mileage. The complainant has its office and principal place of business in the city of Louisville; and the defendants are the duly qualified and acting members of the railroad commission mentioned, having their principal office in the city of Frankfort in the Eastern District of the State, of which they are all inhabitants.

Complaint is made that on August 10, 1910, the railroad commission upon petition of a number of shippers passed an order declaring certain rates then exacted by the railroad company for the transportation of certain commodities between point- named within the State were extortionate, unjust and unreasonable, forbidding their further exaction, fixing lower rates and declaring them to be just and reasonable; and further that the commission at the same times passes another order finding that the complaining parties had paid sums in excess of just and reasonable rates for transportation of such commodities between the points alluded to, and that
140 each was by said order awarded a stated sum of money representing such excess. Quite a number of grounds are stated in the bill against the validity of these orders. These grounds, so far as they need to be passed upon, are stated in the opinion; but it may be said in passing that the statute under which the orders were made is claimed to be violative alike of certain provisions of the Constitution of the State of Kentucky and of the United States. The complainant prayed among other things for an injunction to restrain defendants individually, and also jointly as the railroad commission, from continuing the orders of August 10th, from recommending or causing to be instituted any prosecution by indictment or otherwise against complainant or its officers, agents or employés, to recover any fine or penalty imposed by the statute or on account of complainant's failure or refusal to put the orders or either of them into force on any of its lines, from filing a certified copy of the order finding and awarding reparation in the office of the clerk of the circuit

court in any of the counties having jurisdiction or into or through which any of the lines or road are operated concerning which the award was made, or in the office of the clerk of the circuit court of any other county within the State; and that meantime and until a decision could be had upon complainant's motion for an injunction, a restraining order be granted immediately enjoining the acts in question; and that on final hearing the injunction as prayed be made perpetual, the orders be declared null and void and that a mandatory injunction be issued commanding defendants to recall and revoke each of the orders, and also that the statute under which the orders were made be declared and adjudged to be in violation alike of the Constitution of the State of Kentucky and of the United States.

On motion and a showing of irreparable injury, a restraining order was on September 7, 1910, granted by Judge Cochran in accordance with the prayer of bill, to continue until September 26th of that month, when motion for an interlocutory injunction would be heard; on the last named date certain affidavits were filed by
141 the parties respectively, and on the same date defendants filed two demurrers, one to the whole bill and the other to part of the bill, stating various grounds. But Judge Cochran for good reasons declined to sit further in the case, stating that he would certify this fact to Hon. Henry F. Severens, presiding Circuit Judge. Upon proceedings specially taken Circuit Judge Warrington was designated to sit in the case, and in accordance with the Act of Congress approved June 18, 1910 (U. S. Stat. 1910, part 1, Ch. 309, Sec. 17, p. 557) District Judges Sanford and Denison were by the circuit judge called to his assistance on the hearing and determination of the application for an interlocutory injunction and all questions arising in the cause. On November 3, 1910, the parties to the cause appeared by their respective counsel, and leave was given to complainant to file an amended bill of complaint, and to defendants to amend their demurrers to conform to the bill of complaint as amended. The cause was argued on that day and the printed record and briefs were filed on the 25th of the month.

By the amendment it is averred that at the date of the orders in dispute, complainant owned and was operating lines of railroad in fifty-seven counties of Kentucky, and that its "average total mileage of railroad lines then operated in that and other States was 4590.55 miles"; that the rates which the commission found to be extortionate on August 10, 1910, were less than the maximum charter rates which complainant was authorized to exact; that the new rates fixed by the commission were arbitrary, unreasonable and discriminatory for a number of reasons stated, which so far as necessary will be passed on in the opinion.

Before Warrington, Circuit Judge, and Sanford and Denison, District Judges.

Per CURIAM: In view of the character of some of the federal questions presented by the averments of the bill as amended and of the

good faith in which the questions are urged, it is scarcely nec-
142 essary to say, that jurisdiction of the cause is vested in this court through the presence of those questions, no matter how it shall be found necessary to decide them or whether to decide them at all. Siler v. Louisville & N. R. R. Co. 213 U. S. 175, 190. The nature of the federal questions made is for the most part like those relied on in that case, and they will be stated as we progress. The power of the railroad commission of Kentucky to adopt and enforce the orders in dispute, is denied. By Sec. 209 of the State constitution, adopted September 28, 1891, a commission was established to be known as the "Railroad Commission", comprising three commissioners, whose powers were to be:

"regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations and receive the same compensation as now conferred, prescribed and allowed by law to the existing railroad commissioners." (Russell's Stat. of Ky. 1909, p. 1622.)

March 10, 1900, the General Assembly of Kentucky passes a law known as the McChord Act, entitled:

"An act to prevent railroad companies or corporations owning and operating a line, or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions." (March 10, 1900, Acts c. 32, Sec. 820*a*; Russell's Stat. 1909, pp. 1303-4.)

The body of the act need not be set out, for it appears in 213 U. S. at 179, also 183 U. S. at 484 and 103 Fed. at 218. The rate order now in dispute was made by the commission in virtue of this act. As pointed out in the statement, the constitutional validity of the act is challenged under both the State and federal constitutions. The act has never been passed upon by the Court of Appeals of Kentucky; but it is claimed that certain other statutes which in parts at least were kindred to portions of the McChord Act have been passed upon by the Court of Appeals. We shall consider these later.

The McChord Act was, however, held to be violative of certain provisions of the State and federal constitutions in a decision rendered by Judge Evans shortly after the enactment of the
143 law. Louisville & N. R. R. Co. v. McChord, 103 Fed. 216. That suit was one of several brought by a number of railroad companies operating roads within the State, to enjoin the commission from carrying into effect any of the provisions of the act. Upon appeal directly to the Supreme Court, it was held that the suits and the orders made in them were premature and the decrees were reversed and the cases remanded with direction to sustain the demurrers and dismiss the bills. The constitutional validity of the McChord Act was not determined. McChord v. Louisville & Nashville

Rd. Co. 183 U. S. 483. Later the complainant in the present suit filed a bill in this court to enjoin the enforcement of a certain order made by the Railroad Commission providing maximum rates for the transporation of all commodities by the railroad company to and from all points within the State. The cause was by stipulation submitted to Judge Cochran, who followed the decision of Judge Evans, holding the McChord Act to be unconstitutional; upon direct appeal to the Supreme Court it was again found unnecessary to pass upon the validity of the act, the court holding that "under the statute the commission had no authority to make a general tariff," and the final decree of the Circuit Court was for that reason affirmed. Siler v. Louisville & Nashville R. R. Co., supra, 198.

We are thus brought to a consideration of the validity of the present orders of the commission. It appears by the bill that on May 30, 1910, a number of distilling companies located and engaged in Kentucky in the manufacture, storage and preparation for market and sale of whiskey and other distillery supplies and products, and in shipping the same to and from their respective plants, filed a joint petition as plaintiffs with the railroad commission against the present complainant, alleging that their respective plants were located upon lines and at certain named stations of the railroad which are specially set forth in the bill; that in order to
144 operate their distilleries it was necessary for each of the distilling companies to cause to be transported over the railroad lines from various points shown in an exhibit filed with the petition, certain commodities required in the manufacture and preparation of whiskey and other distillery products for the market; that complaint was made in the petition of certain rates which were being exacted for transportation of the commodities mentioned between stated points of origin and destination both within the State of Kentucky; and in connection with the rates so charged certain other rates were set forth for transportation of the same commodities between the same points, which had been charged prior to March 25, 1910; that the rates complained of were in excess of the former rates and were extortionate, unjust and unreasonable, while the former rates had been maintained for many years and were just and reasonable; and that the petitioners prayed that the commission would after due notice and investigation make and fix just and reasonable rates and not in excess of those charged prior to March 25, 1910. By a second paragraph the petitioners claimed reparation to the extent of the difference between the former rates and the existing rates, the amount claimed by each petitioner being specifically stated with a prayer accordingly.

It is further stated in the original bill—

"the evidence did show, and it is a fact, that on and for a number of years prior to the 25th day of March, A. D. 1910, this complainant did have in effect upon its lines of railroad from the points of origin aforesaid to said points of destination, rates of transportation covering supplies for distilleries that were established and effective alone for the benefit of owners of distilleries located at said last-named points, and with a purpose to encourage the manufacture of

whiskey at said points on the lines of railroad of complainant, and it was shown by the evidence at said hearing, and it is a fact, that said rates (all of which were contained in the tariffs of complainant) did not apply to shipments of said supplies from the same points of origin to the same points of destination when said supplies were intended for other uses than those of the distilleries, but, on the contrary, in such cases, the rates that were contained in its tariffs were, in fact, charged, collected, and received as aforesaid for like supplies when intended for distillery uses. * * * That at all such times, said rates, applicable when the supplies were not for the use of distilleries, were the same rates which, under the tariff effective March 25, 1910, were made applicable also to said supplies when for such use; in other words, the difference in the rate based upon the intended uses of the supplies was abolished, but the rates
145 made effective March 25, 1910, as aforesaid, were and are reasonable and just."

Plainly the issues before the commission involved the question whether the rates which had for years prior to March 25, 1910, been charged for the carriage of distillers' supplies and products within the State of Kentucky, should be restored, and whether the difference between those rates and the rates which had been put into effect on March 25, 1910, and thereafter exacted down to the filing of the petition before the railroad commission, was recoverable as reparation. Upon these issues and the evidence adduced, as well as the arguments and briefs of counsel for both sides, the commission on August 10, 1910, made the two orders. The recitals contained in these orders are alike so far as they relate to the filing of the written complaint and exhibits, to the transmission of certified copies thereof by mail to the railroad company, to a written communication from the chairman of the commission advising the railroad company of the general nature of the complaint and fixing a day for the hearing more than ten days thereafter for the time and place of hearing and the appearance of the parties by their counsel, to the fact of testimony being adduced and the hearings upon both testimony and arguments, including the filing of briefs, and following these in the first order this appears:

"The commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected, and received by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable and by charging said rates defendant is, and has been, guilty of extortion.

"It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is hereby forbidden to charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows (See table attached).

"The commission is of the opinion that the foregoing rates so fixed for the transportation of said commodities from and to said points are just and reasonable."

"It is further ordered that this order be entered upon the records of this office, and a copy thereof attested by the Secretary of the Commission be furnished defendant."

The table of rates comprises three places of origin, viz. Covington, Newport and Louisville, Kentucky, and sixteen places of destination in that State. The rates are in cents per 100 pounds, upon
145 packages, barrels, bottles, etc., containing unnamed articles, while the articles that are named consist of corn, rye, malt or barley, and iron hoops. As we understand these rates, they are the same as the rates that are prior to March 25, 1910, charged for the carriage of distillers' supplies and products, but that they are by the order extended to all shippers of like packages and commodities between the points and along the lines named, without regard to the occupations of such shippers; whereas the rates put in force by the railroad company on and after March 25, 1910, were the same as those previously exacted of shippers between said points on said lines who were not engaged as distillers. In other words, the uniform standard of rates as fixed by the railroad company on March 25, 1910, was that previously charged to non-distillers, while the uniform standard fixed on August 10, 1910, by the railroad commission was the one existing prior to March 25, 1910, in favor only of distillers.

For reasons stated later it will not be necessary or proper to pass upon the other order of the commission.

The first objection to the rate order is that the statute in virtue of which it was made, in terms confers judicial power upon the Commission in violation of Secs. 27, 28, 109 and 135 of the State constitution. The first two of these sections provide for the distribution of the powers of government, legislative, executive and judicial, and forbid persons in one of these departments from exercising any power belonging to either of the others. By Sec. 109, the judicial power, both as to matters of law and equity, are vested in the senate when sitting as a court of impeachment, the Court of Appeals, and "the courts established by this constitution"; and by Sec. 135: "No courts, save those provided for in this constitution, shall be established."

As regards the question of rates, it is made the duty of the commission by the McChord Act upon complaint made or information received or reason to believe, that a railroad company is exacting "extortionate freight or passenger rates * * * to hear
147 and determine the matter as speedily as possible." The act requires the commission to give the company complained of not less than ten days' notice by letter mailed to an officer or employé stating the time and place of hearing, the nature of the complaint or matter to be investigated, and "to hear such statements, arguments or evidence offered by the parties as the commission may deem relevant." The act further provides that should the commission determine that the company is or has been "guilty of extortion" the commission "shall make and fix a just and reasonable rate," which the company may exact "for like services thereafter rendered." The rates so fixed

"shall be entered and be an order upon the record book and signed by the commission and a copy mailed to an officer or employé of the company affected. This rate shall be in force and effect at the expiration of ten days thereafter, and may be revoked and modified by an order likewise entered of record."

The contention is that the words employed in clothing the commission with authority clearly indicate a design to invest the commission with judicial power. It is clear that the rate-making power is vested, and that this is legislative in character. But it is said that the exercise of this power is dependent upon the duty "to hear and determine" whether the corporation "is or has been guilty of extortion"; and that this duty can not be performed without exercising judicial power.

Before the McChord act was passed, the General Assembly of Kentucky by Sec. 816 had defined the exaction by any railroad company of "more than a just and reasonable rate of toll and compensation for the transportation of passengers and freight" as "extortion," and had by Sec. 819 penalized such exaction as an offense. But a judgment and verdict of conviction under an indictment charging such offense was reversed in the case of Louisville & Nashville Railroad Co. v. Commonwealth, 99 Ky. 132, because the statute leaves "uncertain what shall be deemed a just and reasonable rate of toll and compensation" (136). Further, in the course of the opinion it was said (139, 140):

145 "No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by snippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury."

Apparently the difficulty encountered in that case was sought to be remedied by the McChord Act; for the very mode prescribed by the McChord Act for the exercise of the rate-making power was calculated to furnish the commission with the facts necessary to ascertain what a just and reasonable rate would be and also to put to the test the reasonableness or not of the existing rate. It is hardly conceivable in a contested case that the mind could be prepared to resolve the question of "extortion" or "extortionate rate," without obtaining and considering facts tending to show what would be a fair compensation for the service in issue; and those very facts would inevitably establish a standard for at once fixing a reasonable rate to be charged for the service and testing the character of the existing rate. The circumstance then that these two results must necessarily be reached in the manner pointed out is one that ordinarily attends the exercise of legislative power.

It would therefore seem that the true intendment of the statute respecting rates was to bestow legislative power, rather than judicial power; and that the legislative power given to fix a just and reasonable rate to be enforced in the place and stead of the unreason-

able rate, necessarily embraced as part of the legislative power itself the right to find the fact of unreasonableness of the existing rate. If this latter right cannot be included in the grant of the legislative power so vested, without violating the provisions of the State constitution concerning judicial power, it is difficult to see how any rate-making power at all could be granted. We cannot believe that the judicial power which was designed to be alone vested in the courts mentioned in those provisions, was intended to prevent either the legislative department or the railroad commission from investigating into and finding facts which are but the necessary and familiar incidents and conditions to right legislation.

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In reaching this conclusion we do not overlook the particular words used or their sequence, as set forth in the McChord Act. Even if Sec. 816 of the Kentucky Statutes did not survive the decision in Louisville & Nashville Railroad Co. v. Commonwealth, before cited, in the sense as there stated (140) "the statute may be invoked as merely declaratory of the common law" respecting the legislative meaning intended to be attached to the word "extortion" in its relation to railroad rates—that is, that any change of "more than a just and reasonable rate" was "extortion"—still one of the accepted meanings of the word extortion is to overcharge; and the word could not have been used in any other sense in the McChord Act, because the penalties embraced by that statute are not inflicted for practicing extortion through exaction of the old rates, but for exacting "a greater or higher rate, toll or compensation, for like service thereafter rendered than that made and fixed by said commission." The established common law meaning of reasonable rates and inhibition of unreasonable rates, must then have been in the minds of the law makers when using the phrases "fix a just and reasonable rate for freight or passengers" and "guilty of extortion." It should be noted that in Siler v. Louisville & Nashville R. R. Co. (213 U. S. 175) Justice Peckham did not seem to observe any vice in the use of the word "extortion." He said (197):

"The statute, it will be remembered, gives no power to the commission to fix rates, unless it has already determined that the rate complained of, or which it has investigated upon its own information, are extortionate after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate there can be no fixing of rates in that particular."

That this railroad commission was not exercising judicial power within the inhibited sense of the State constitution is shown we think by the decision of the Supreme Court in Prentis v. Atlantic Coast Line, 211 U. S. 210. The suits there involved were brought to enjoin the Virginia State Corporation Commission from publishing or enforcing its order fixing passenger rates to be charged on railroads operating in the State of Virginia. One of the grounds averred was that the rates were confiscatory. The commission was created by the State constitution and its powers were defined by that instrument and certain statutes passed in pursuance of it. It was invested with legislative, judicial and ex-

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ecutive powers. It was contended that the proceedings before the commission were proceedings in a court of the State which the federal courts were by Rev. Stat. Sec. 70 forbidden to enjoin, and that the decision of the commission made the legality of the rates res adjudicata. The contentions made under the demurrers and pleas necessarily put to the test the nature of the power the commission was exercising when issuing the orders, receiving and considering the evidence offered and finally fixing the disputed passenger rates. Speaking for the court in respect of these proceedings Mr. Justice Holmes said (226):

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind. . . ."

Again (227):

"And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

We do not fail to observe the fact that the Virginia Commission does not seem expressly to have been required as the Kentucky Commission is, to find the existence of extortionate rates as a condition to the right to fix and supplant them by new ones. But apart from the practical necessity for the Virginia Commission to look into and consider the existing rates, no perceivable distinc-
151 tion is to be found between the nature of the power exercised at the hearing and investigation into evidence of facts upon which the new rates must of necessity be based, and that of the power to pass upon the question of extortionate rates then existing. All such matters are but preliminary and inducive to the exercise of the main power—the legislative rate-making power—and are as certainly mere incidents as are any other facts leading up to the making of the legislative rate; for it must constantly be borne in mind that everything found in such investigation is in effect but collateral to the new rule which is thereafter to be formulated and applied.

This of course suggests and we feel keenly the force of the statement made by the late Justice Brewer in Interstate Commerce Commission v. Railway Co. 167 U. S. 479, 499:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

It is to be noticed that the question with which the learned Justice was then confronted was whether the Interstate Commerce Commission was possessed of the rate-making power. He was not considering a question like the one we are now endeavoring to solve. He was dealing with a claim that the rate-making power was to be implied from other powers with which the commission was expressly clothed. It might well have been that an order of the federal commission finding that any given rates were unreasonable and ordering the railroad company to cease and desist from further exacting such rates, which order would become prima facie evidence of the fact of unreasonableness in any proceeding brought in a court to enforce it, was judicial in its nature; but if we rightly interpret the decision in Prentis v. Atlantic Coast Line, we are unable to see why a finding of the same character respecting particular rates made by a commission having express power to fix and with purpose to fix new and reasonable rates for future enforcement and operation, should not be regarded as merged in the new rule
152 and treated as part of the legislative power exercised in adopting the rule. Southern Pac. Co. v. Bartine, 170 Fed. 725, 775. Indeed, Justice Brewer must have had in mind when using the language before quoted, a principal similar to that expressed in Prentis v. Atlantic Coast Line, for at an earlier stage of his opinion in Interstate Com. Commission v. Ry. Co. he said (494):

"Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable."

While it is true as before stated that the Kentucky Court of Appeals has not passed upon the question now under consideration, yet it has decided one or two questions which are so far kindred as in some degree to disclose that court's views of the powers of the commission. Louisville & Nashville Railroad Co. v. Commonwealth, 106 Ky., 633, decided less than a year before the passage of the McChord Act, was an appeal by the railroad company from a judgment of conviction under an indictment for violating the long and short haul provision of the statute of the State. The statute was enacted in pursuance of Sec. 218 of the State constitution, which forbids a railroad company to charge greater compensation for transporting passengers or property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; subject however to a proviso that upon application to the railroad commission the carrier may after an investigation by the commission be authorized to charge less for longer than for shorter distances, and the commission may from time to time prescribe the extent to which such carrier may be relieved

from the operation of the section. To carry this into effect, the statute was enacted making a violation of a provision similar to one contained in the section an offense and imposing a fine of not less than $100 nor more than $300, to be recoverable by indictment in a named circuit court. The matter in controversy con-
153 cerned the transportation of coal, the company charging a greater sum for a shorter distance than it charged for longer distances. The company justified the difference in rates on the ground that it was necessitated by competition. The matter had pursuant to the statute been submitted to the railroad commission, and after investigation had upon notice and hearing that body made an order in writing "declining to exonerate the company from the operation of the provisions" of the statute, and thereafter at its suggestion appellant was indicted, found guilty and fined. In the course of the opinion of the court it was said (683):

"To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable, is to put in their hands a power dangerous to the welfare of the community. . . . It was the aim of the Constitution to require the railroads in the State to treat all localities fairly and with equality; but, as differences of condition ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a shorter than for a long haul under like circumstances and conditions." . . .

And again (640):

"The power to determine this matter must be vested somewhere, and, the constitution having created a special tribunal for this purpose, we cannot see that its provisions are subject to any of the objections raised by appellant."

It is true that no new rates were in that case fixed by the commission; but since the constitution and statute forbade exaction of the charges if the transportation in both instances was furnished "under substantially similar circumstances and conditions," the commission necessarily passed upon that question when adopting its order or refusal as certainly as it would have decided it if the order had been to exonerate. The inevitable effect of its conclusion was that the company's rates were unreasonable. In principal nothing more than this respecting the exercise of judicial power was done in the present case. The case was taken to the Supreme Court of the United States (Louisville & Nash. Rd. Co. v. Kentucky, 183 U. S. 503, 515), and that tribunal in spite of the existing
154 federal rule respecting long and short hauls, felt itself bound to accept the meaning of the State enactment as construed by the State court; and passing upon the federal questions presented affirmed the Court of Appeals.

Still another order of the railroad commission was upheld by the Court of Appeals in Commonwealth v. Louisville & Nashville Railroad Co. 120 Ky. 91. The action was one to compel the railroad company through mandatory process to furnish greater facilities

for the transportation of passengers and freight between points named in the State. It appeared that a proceeding was begun before the railroad commission against the railroad company, and upon due notice a hearing was had by the commission upon evidence. The commission decided that the public had a right to the use of "local passenger and freight train service over the railroad from Shelbyville to Christiansburg as demanded." The company refused to comply with the commission's order. One of the defenses was that the expense of compliance would entail upon the railroad company a heavy and continuous loss. Under certain statutory provisions railroad companies were required to run at least one passenger train each way on every day of the year, Sundays excepted. It was said in the opinion (104):

"The power to regulate the relative rights and duties of the railroads and the public in this State has, in large measure, been delegated by the Legislature to the Railroad Commission, and the provisions of the statute under which the commissioners acted in this case being reasonable, we can but conclude from the facts disclosed by the record that their determination of the questions presented by the complaint upon which they acted was proper, and for the convenience of the public. Therefore the recommendation made by them should have been obeyed by the railroad companies, but, they having failed to do so, appellant could but resort to the courts for relief."

See also Pennington v. Wolfolk, 79 Ky. 13, which sanctioned the vesting of power not judicial in the county court. That was done under an earlier constitution, but apparently not differing materially from the present one touching distribution of powers.

It is not disputed that the rate-making power is legislative in character; McChord v. Louisville & Nashville Rd. Co. before cited (183 U. S. 483, 495), Prentis v. Atlantic Coast Line, before
155 cited (211 U. S. 210, 226), Louisville & Nashville Rd. Co. v. Interstate Commerce Commission, decided April 10, 1910, by the Circuit Judges of the Sixth Circuit, Judge Severens announcing the opinion, to be reported; nor that the power may be delegated; Louisville & Nashville Rd. v. Interstate Commerce Commission, supra; Atlantic Coast Line v. N. C. Corp. Com. 206 U. S. 1, 19; Vil. of Saratoga Spgs. v. Saratoga G. Co. 191 N. Y. 123, 132 to 140, presenting a review of New York and federal decisions concerning doctrine of delegated authority, and 140 to 146 as to delegated power to fix rates.

We are therefore constrained to hold that the McChord Act is not violative of the judicial clauses of the Constitution of the State of Kentucky.

Another objection made to the constitutional validity of the McChord Act is that neither that act nor any other contains a provision for appeal to any court from a final order of the commission declaring an existing rate extortionate. This objection may be considered in connection with a still further one that is made on account of the penalties prescribed by this act. Both of these objections are in terms founded upon averments of the bill as amended

and claims urged in argument, that the absence of the right of appeal and the severity of the penalties imposed are alike violative of the due process and equal protection clauses of Sec. 1 of the Fourteenth Amendment.

As regards the claim that the constitutional guaranty of due process is violated by the rate order, the inquiry is whether the bill and affidavits show that complainant would through enforcement of the new rates be deprived of property. No averment is made either in terms or effect that the new rates would not yield a profit to the carrier, much less that its entire business would not do so. In the absence of a showing that property is taken the protection of this guaranty can be invoked. What may be a reasonable rate or return, as a matter of legal policy having due regard to encouraging the investment of capital in railroad enterprises, is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question. The law makers dealing with the legislative problem might think that in successful business years, a maximum return for example of 10% upon the investment would be reasonable; the courts dealing with the judicial problem are affected by locality and attending risks and circumstances involved in the particular case, and apparently insist only upon a maximum return to the owner of property devoted to public use which will be reasonable (say for example 6%) upon the properly computed investment. An illustration of this rule may be found in the announcement made by Justice Peckham in Willcox v. Consolidated Gas Co. 212 U. S. 19, 20;

"There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant is entitled to a return, if it is possible, of 6 per cent upon the fair value of its property actually used in its business of supplying gas."

In City of Owensboro v. Cumberland Telephone & Telegraph Co. 171 Fed. (C. C. A. 6) 739, it was said by the present Mr. Justice Lurton respecting certain rates in dispute (747): "it is plain that the rates of such a company may not be reduced to a point below a rate which will pay operating expenses, maintain the plant, and return a fair profit upon the capital actually invested."

It is to be observed of the decisions in those cases that the justices were speaking of the entire property and earnings of the companies involved. But there seems to be a distinction made between cases "in which a public service is distinctly intended and rendered," and cases "in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use." Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 93. Thus, as respects the former class, in Minneapolis & St

Louis Rd. v. Minnesota, 186 U. S. 257, where certain coal
157 rates as fixed by a State railroad commission were involved and one of the questions was "whether the tariff fixed by the commission is wholly inadequate and not compensatory," Mr. Justice Brown said (267):

"While we have never decided that the Commission may compel such reductions, we do not think it beyond the power of the State commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

See also San Diego Land Company v. National City, 174 U. S. 739, 754.

There is then manifest room for vagueness and ambiguity in employing a word like "unreasonable" to characterize a rate. What might be regarded by a carrier as unreasonable, might be considered by a court as just and reasonable.

Now, turning to the bill and affidavits in the present case, we find general averments that the new rates are unreasonable and absurdly low, etc. But the bill does not clearly tender an issue that can be said to involve confiscatory rates; and complainant's counsel state in their brief that complainant is not bound in this case to allege or prove that the new rates are confiscatory, and upon the oral argument the same counsel expressly disclaimed a purpose to rely upon any contention that the new rates are confiscatory. This concession we think was but natural, in view of the history of the rates which the railroad company voluntarily maintained for years prior to March 25, 1910, as before pointed out. No averment is made touching the proportions in volume of distillers' traffic and of non-distillers' traffic, and it could not be assumed that the company had been carrying distillers' supplies and products at confiscatory rates; nor that the extension of those rates to all similar traffic on the lines in question would amount to the confiscation of property. In view therefore of the bill and the disclaimer of counsel, we think that argumentative statements like those contained in the form of affidavits should be for the purposes of this preliminary injunction disregarded. The result is that the rates in dispute must so far at
158 least as they are applicable to traffic originating and carried wholly within the State, be treated at this stage of the case as not unreasonable in the sense of being confiscatory, but on the contrary as just and reasonable, and consequently as within the power of the commission.

The issue, then, if any can be said to arise on this branch of the case under the due process clause, is not presented through averment of facts but by argument based on the legislative failure, through the McChord Act or other statute, to provide for a judicial review of a rate-making order. It must be borne in mind, however, that the McChord act in terms provides for notice to the railroad company and a hearing, before any rate-making order can be made; and that complainant was notified of the complaint and given opportunity to be heard upon it and was in fact heard both

by evidence and argument before the order was adopted; and, moreover, that the act further provides that no such order shall take effect until a copy of it is mailed to a representative of the railroad company and until the expiration of ten days thereafter. Was it necessary to provide both of the remedies mentioned, or at least the one for judicial review after the passage of a rate-making order, to avoid violation of the guaranty of due process?

In Cin., N. O. & Texas Pac. R. R. *v.* The Commonwealth, 81 Ky. 492, complaint was made against an order of the railroad commission of Kentucky equalizing and increasing taxes laid upon railroad property. The companies were required through specified officers to make annual return under oath to the auditor of public accounts, of the mileage and average value per mile of the railroads, etc. Lack of due process was urged on the theory that there was no provision for notice and hearing before the order was made, or for revising or reviewing the order after it was made; it was not that the railroad companies did not have actual notice or that they were not in truth heard, or even that the valuation placed was too high (pp. 498, 502, 504, 505). After speaking of the term "due process of law" (509), Judge Pryor in announcing the opinion of the
159 court, said of the commission (512):

"The time and place of the meeting having been fixed by law, is notice to all, and if the reports of the chief officers of these corporations are to be regarded as an assessment and the commissioners a board of review, the act provides that they shall assemble at the Auditor's office in Frankfort, on the first day of September in each year, for the purpose of fixing valuations, and with that view are required to examine the reports made by the officers of the roads. This is notice to the companies, and to require actual notice to every one interested, if this board has supervisory power over all property in the State, would be altogether impracticable; nor will it answer to say that because there are only a few lines of railroad within the State, that actual notice could be readily given, for the courts would then be determining the constitutionality of the act by the extent of their supervisory power.

As we construe this act, although in the nature of an original assessment, the parties had the right to be heard, and were, in fact, heard before the board passing on the question of valuation."

The decision was affirmed in Kentucky Railroad Tax Cases, 115 U. S. 321. Justice Matthews, speaking for the court and of the annual return above mentioned, said (333):

"This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert."

The learned justice at a later portion of the opinion (335) disposed of a claim that there was no security against arbitrary action of the commission, by stating that the possibility of such a result was but the necessary imperfection of all human institutions which

admits of no remedy. He also alluded to the fact that the tax had ultimately to be enforced by judicial proceedings. These decisions met with approval in San Diego Land Co. v. National City, 174 U. S. 739, upon grounds which we regard as controlling. The decision in the San Diego case involved the validity of constitutional, statutory and municipal provisions, for the regulation of water rates. One ground of objection was that those provisions did not furnish due process of law. One thing to be observed of the relevancy of the decision to the present case, is the comment there made upon decisions involving railroad rate-making power. After distinguishing the case of Chicago, Milwaukee, etc. Railway v. Minnesota, 134 U. S. 418, on the grounds that the Supreme
160 Court of Minnesota had held that the State statute in question made the action of the commission final and conclusive as to railroad rates and that the railroad companies were not at liberty in any form or at any time to question them (748), Mr. Justice Harlan, in delivering the opinion of the court and speaking of the necessity of notice to appellant before fixing the water rates, said (752):

"Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the first day of July thereafter. It was made by statute the duty of the appellee at least thirty days prior to the 15th day of January in each year to obtain from the appellant a detailed statement showing the names of water rate payers, the amount paid by each during the preceding year, and 'all revenue derived from all sources,' and the 'expenditures made for supplying water during said time.' It was the right and duty of appellant in January of each *month* (year) to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by ordinance. . . . Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to receive the statement referred to in the statute, or to have duly considered it and given it proper weight in determining rates."

Allusion to the Kentucky Railroad Tax Cases, supra, follows, and then the learned Justice proceeds (753):

"There is no ground to say that the appellant did not in fact have or was denied an opportunity to be heard upon the question of rates. On the contrary, it appears in evidence that the subject of rates was considered in conferences between the local authorities and the officers of the appellant. Those officers may not have been present at the final meeting of the city board when the ordinance complained of was passed."

In view of the provisions made by the McChord act for notice and hearing and the actual hearing and trial had upon evidence and argument in the instant case, we think it falls fairly within the decisions in the Kentucky Railroad Tax Cases and the San Diego

case. It can make no difference that the order so made upon notice and trial was final. As said by Justice Shiras respecting an order of this very commission in Louisville & Nash. Rd. Co. v. Kentucky, 183 U. S. 503, 515:

"Finality is a characteristic of the judgment of all tribunals unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of land taken for public use or to assess damages to them, whose findings are deemed final."

161 Hence the present case does not fall within the ban of those decisions which deal with the statutes or with orders of subordinate bodies denying both notice and hearing, or with rates either admittedly or manifestly confiscatory.

As regards the penalties fixed by the McChord act, the most that can be claimed is that through their excessive character the officers and agents of complainant and also its property, would be imperiled by resort to judicial proceedings for the purpose of contesting the validity of the order fixing new rates. It is true that these penalties are severe. The provision is:

"And should said railroad company or corporation, or any officer, agent or employé thereof charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars, no- more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars no- more than two thousand dollars, and for the third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars."

It is claimed in behalf of the commission that under certain decisions of the Court of Appeals there can be but one offense and one penalty of $1,000 for that offense; but on behalf of complainant these decisions are sought to be distinguished on the ground that the statutes there involved related only to a single person or company, while here the act relates not only to the carrier but to each of its officers, agents or employés, in the sense that each could be prosecuted for committing the first, second, third and subsequent offences. It is also urged by the commission that the penalties clause could be held void and the rest of the act valid. Further, the commission has presented affidavits disavowing any purpose to try to enforce the order through the penalties at least until the validity of the order has been passed upon in a civil suit. It would seem that an order fixing just rates could be enforced in Kentucky by civil action. Commonwealth v. Louisville & Nashville R. R. 120 Ky. 91; Sec. 273 of the Civil Code of Kentucky.

162 If then the order fixing new rates is within the power of the commission, a court cannot rightfully pass upon the wisdom of the penalties or the right to impose them. The question

comes to be, whether the railroad company is entitled to complaint of the amount of the fines, where it cannot aver and maintain that the rates to be violated are confiscatory. Surely this case is not like that of Ex parte Young, 209 U. S. 123. There the charge was that the rates were confiscatory, and the very drastic nature of the penalties, involving imprisonment, was calculated to deter the representatives of the railroad companies from attempting by judicial proceedings to protect the property against confiscation. In the course of the opinion, Justice Peckham said (147):

"In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested in the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."

What we have said in respect of due process concerning new rates and the effect of the penalties, applies in large measure to the claim respecting the additional guaranty of equal protection of the laws. If the rates in dispute are reasonable in the sense before pointed out, the complainant is manifestly accorded both by the order and the statute the same rights and privileges that are rightfully granted to every other railroad carrier. This is equally true as to the penalties. It is only when a particular person or class of persons (including corporations) is denied equal privileges in comparison with those extended to others similarly situated, that the equal protection guaranteed by the Fourteenth Amendment applies. It can not be necessary to comment upon the class of well known decisions,
163 which recognize and declare this rule. We however cite Stone v. Farmers Loan & Trust Co. 116 U. S. 307, 335; Louisville & Nashville R. R. Co. v. Melton 218 U. S. 36, 52; Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, Admr. (U. S. Supreme Court), decided December 10, 1910, not yet reported.

Complainant urges that its own rate-making power and its maximum rates were fixed by a special charter granted by the State prior to the date of the present constitution and are so far contractual as to prevent either the State or its commission from interfering with the company's rights in this regard. The claim is that the railroad's rates which were supplanted by the commission's rates were lower than those authorized to be exacted by the charter, and that the supplanted rates cannot therefore be said to be unreasonable or the new rates reasonable. The contention of course is that the order of the commission impairs the obligation of the

charter contract within the meaning of the inhibiting clause in that respect of the Federal Constitution.

It is provided by Sec. 3 of the Kentucky Bill of Rights that "every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment;" by Sec. 59 of the State constitution the General Assembly is forbidden to pass a local or special act giving to "any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes;" and by Sec. 190:

"No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this constitution."

It is averred in the bill that by a resolution of its board of directors adopted July 11, 1902, complainant accepted the provisions of the present constitution, and also the provisions of Chap. 32 of the Kentucky statute enacted April 5, 1893. That chapter applies to private corporations, including railroad companies and the railroad commission. The first article of the chapter relates to "General Provisions" and includes Sec. 573:

161 The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897. . . . ."

Sec. 816, to which we have alluded as having been involved in the decision of Louisville & Nashville R. R. Co. v. Commonwealth (99 Ky. 132), was embraced in Art. 5, Tit. Railroads of Chap. 32; and nearly two years prior to the acceptance by complainant of the constitution the McChord act was passed. Even if complainant's right to maintain its charter rates was not repealed by Sec. 573 in connection with 816, it is clear that such right was repealed through enactment of the McChord law and complainant's subsequent acceptance of the provisions of the constitution. It can not be either that complainant's charter rates or its rate-making power could survive and remain paramount to the rate-making power created by the McChord act; the absolute inconsistency of such powers is apparent. Further, it is stated in the bill "that the contract between the complainant . . . and the Commonwealth of Kentucky became and is no longer irrevocable or irrepealable;" but it is averred that the contract remains intact and has never been repealed or revoked by any act of the legislature, and the obligation thereof at the date of making the order in question was still in full force and effect. The argument in substance is that there has been no express repeal and that none can be implied. But we think a complete answer to all this is to be found in the decision announced by Mr. Justice White in Mo. Pac Ry. Co v. Kansas, 216 U. S. 262. It was claimed in that case that the railroad commission of Kansas could not by

order require the company to run trains over the portion of its line which was maintained in the State of Kansas, because of its charter provision vesting in it the right to determine the time and manner of operating such trains. One of the reasons assigned was that "as the legislature had not expressly amended or repealed the
165 right, such a result should not be made to flow from the section conferring powers upon the commission, as repeals by implication were not favored" (272). After referring to certain propositions stated and of a purpose to consider them, the learned Chief Justice said (274):

"Before doing so, however, we dispose of the question concerning the alleged impairment of a contract right, protected by the Constitution of the United States, which is formulated in the fourth proposition, by pointing out the twofold contradiction upon which the proposition is based. As it is not denied that the asserted charter right was held subject to the power of the State to repeal, alter or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 345. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act had impaired a contract without by the same token declaring that such act has either repealed, altered or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract."

A principle for finally testing the validity of the order now in question is stated in Louisville & Nashville Railroad Co. v. Interstate Commerce Commission, supra, where, respecting the reasonableness or not of an order, Judge Severens said:

"It is at this point that the judicial power over the subject may be invoked. And the rule by which it is exercised is, that, it will not interfere with the action of the Commission unless it clearly appears that it is beyond its authority and injuriously affects some substantial right of the complainant,—is confiscatory, to use that term in its broad sense. Whether it is so or not is the test of reasonableness in such controversy."

This principle was announced by Mr. Justice White in Interstate Comm. Comm. v. Ill. Cent. R. R. Co., 215 U. S. 452, 470: "Power to make the order and not the mere expediency or wisdom of having made it, is the question."

We have thus far considered the new rates with respect to transportation commencing and ending at points within the State of Kentucky. But they must be subjected to a still further test. It is insisted by complainant's counsel that the order of the commission reducing the rates on certain commodities directly and necessarily affects interstate commerce and is in conflict with the act to regulate commerce. The averments in this behalf of the bill as
166 amended are made up rather of conclusions of counsel than of definite statements of fact. As stated by Justice Peckham

in Equitable Life Assurance Co. v. Brown, 213 U. S. 25, 43: "We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill," etc. As an example, see Southern Railway v. King, 217 U. S. 524, 536. However, it may be that some of the averments are sufficient to warrant the introduction of evidence in their support.

One averment in form is that the McChord act "is an express and direct interference with and regulation of interstate commerce" (par. IX of Bill). We have no hesitancy in saying that the act is not open to any such interpretation; nor in affirming that nothing is to be found in the rate order in dispute or in any fact either averred or shown, tending to disclose a design on the part of the commission to interfere with or to regulate interstate commerce. When we consider the bill and affidavits in connection with assertions made in the brief of complainant, we infer that it is intended to set up general classes of facts and specific facts as follows: A certain volume of interstate traffic, in corn, rye, barley, malt and other distillers' supplies, is constantly moving from points north of the Ohio River through Covington or Newport to some of the interior points named in the order. Some of this originates at Cincinnati, some further north. The existing through rate from Cincinnati is and has been the same as from Covington or Newport, and the through rate from points north of and beyond Cincinnati is and has been the same as the rate from those points to the Ohio River, plus the rate south of the river. A car of rye from Cincinnati to Bardstown, Ky., is typical of this through traffic, and upon this car (minimum) the present rate from Cincinnati would be $38.40, and the new rate from Covington would be $24.00. The fair and reasonable charge for transporting this car from Cincinnati to Covington would not exceed (for example) $5.00. Under the new rates, this
167 car-load could be shipped from Cincinnati to Bardstown for not to exceed $29.00. As a matter of fact, we infer it is meant to say, all through shipments of such cars from Cincinnati to Bardstown would cease unless complainant should, as it would for business reasons, reduce the through rates to (for example) $29.00. A substantially similar state of facts exists at the Louisville gateway with reference to Louisville and Jeffersonville. (This state of facts is made to appear by tables set out in the brief). It is averred that the enforcement of the new rates will cause an annual loss of $15,600 to complainant in its rates on local shipments, and a further annual loss of $3,000 in its rates on interstate shipments; and it is stated by affidavit that there are no through rates on the articles in question from points outside the State to points within the State, such charges being assessed by combining the rates from points of origin to Louisville, to Covington or to Newport (at which points such shipments enter the State) with the rates from those points to the point of destination in Kentucky.

Since it is to the interest of both parties to this case that the actual facts should be made to appear by proper pleadings, we have con-

cluded to say that the complainant may, if it sees fit, amend its bill so far as it truthfully can aver the facts just recited and which we infer from the sources of information before pointed out to exist.

Assuming for present purposes that such or a similar state of facts as those indicated were averred and could be proved, could it be rightly concluded that putting the new rates into effect would operate as a direct interference with and regulation of interstate commerce? If it would, it needs no argument to show that such enforcement would be violative of the federal commerce clause. It is plain enough that reduction in receipts would be one of the results of enforcement of the new rates; but it does not seem to us to follow that any of the figures adduced show direct interference with interstate rates, any more than they show unreasonable or confis-
168 catory local rates. Such a depletion of revenue would seem rather to be an indirect result of a proper exercise of purely State power. The alleged loss of $3,000 to be suffered it is said, on the through traffic, we can not accept as a statement of necessary legal consequence, because to do so would be to assume the direct effect which is in question. The loss alleged is apparently the same in principle as would be a loss or expense resulting from a due exercise of the universally recognized police power residing in the State. It is to be observed that the railroad company has made up its interstate rates by uniting its local rates with rates charged either by itself or by other companies for transportation outside of Kentucky, the bill averring that the full amount of complainant's "existing local rates in Kentucky enters into and forms a part, in most instances, of its through rates (set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910 . . .) on such interstate shipments of freight belonging to the same classes." Can it be that such combining and finding of local rates as interstate rates, remove such local rates altogether from the jurisdiction of the State for purely State purposes?

Surely Congress did not intend by the interstate commerce acts that interstate rates made and filed as plaintiff's have been, should thereafter operate not merely as interstate rates, but also as intrastate rates. To say that Congress so meant is to ascribe to that body the purpose to take over to itself the whole rate-making power, both federal and State. The only theory upon which such a claim can be urged is that Congress has provided that interstate rates shall be filed with the Interstate Commerce Commission, and shall not thereafter be changed except in a prescribed time and manner; and so the rates thus filed amount to an adoption by Congress or its Commission in the sense that the rates exist and must be enforced as federal-made rates. But it is expressly provided in each of
169 the interstate commerce acts, that the act shall not apply to the transportation of passengers or property "wholly within one State, and not shipped to or from a foreign country from or to any State or territory" (Act Feb. 4, 1887, 24 Stat. sec. 1, p. 379; Act June 29, 1906, 34 Stat. sec. 1, p. 584; Act June 18, 1910 sec. 6). Moreover, although the interstate rates of complainant from Jeffersonville, Indiana, or from Cincinnati, Ohio, to Bardstown

Kentucky, are the same as the rates charged from Louisville, Covington and Newport, Kentucky, still complainant's adherence to its interstate rates and its observance of the new local rates in dispute, would not under the interstate commerce act be regarded as an intent to discriminate against localities like Jeffersonville or Cincinnati. Saunders v. Southern Express Co. 18 I. C. C., 415, 421. Again, the State-made rates are not regarded by the Interstate Commerce Commission as binding "as a necessary measure of the interstate rate." Saunders v. Southern Express Co., supra, (21); Hope Cotton Oil Co. v. Texas & Pac. Ry. Co. 12 I. C. C. 265, 269. Conversely, under these decisions it is difficult to see why the State should be bound to adopt interstate rates; for, although the federal power is supreme respecting interstate rates, that would leave the State with no power at all in regard to local rates.

What is claimed is that conditions existing in Kentucky do not warrant a greater charge for the carriage of freight within Kentucky as interstate freight, than for the carriage of purely local freight; and the averment that the company will make a reduction of its interstate rates to correspond with the rates in dispute, states nothing more than that it will do this for strictly business reasons. The question then comes at last to this: whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just
170 and reasonable local rates imposed by the State for the transportation of traffic originating and ending wholly within the State, can be said to be a direct and not merely an indirect effect of the State's action. Thus, in distinguishing direct from indirect effect, can such conditions be made the basis of a presumption of fact equivalent to a rule of law such as a federal statute forbidding interstate rates from exceeding the sum of the local rates between given interstate points? One difference between such presumption and rule is the uncertainty whether the railroad company in the end, at its election, will not decline to yield to the conditions created by the two sets of rates—interstate and local rates—and so defeat any presumption of fact that might be indulged in its favor by the courts; while the rule of law may always be certainly enforced through judicial decision. Another difference is that any election by the company to change the interstate rates, would seem to be an intervening cause and consequently render such change an indirect result. Without *deducing* whether there may be facts attending the administration of a State law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not specified in the law, yet as applied to this case the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates because they are local, and the State could not change them because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that so far as rate making is concerned, the State

railroad commission would have no reason to exist; and State
171 regulation of State rates would become simply historic. Before accepting such a doctrine let us briefly recall the views of the court of last resort touching the power of the State to regulate commerce carried on exclusively within its borders.

In Gibbons v. Ogden, 9 Wheat. 1, Chief Justice Marshall, after defining the meaning of the words of the commerce clause, said (194):

"It is not intended to say, that those words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States".

This rule has ever since been recognized as sound. As late as the decision rendered in the Employers' Liability Cases, 207 U. S. 463, Mr. Justice White, in announcing the opinion of the court, accepted the doctrine both as to the United States and the States, as laid down by Chief Justice Marshall in Gibbons v. Ogden. After setting out the rule concerning the power of the United States, he said (493):

"Accepting, as we now do and has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (p. 194) of those matters of State control which are not embraced in the grant of authority to Congress to regulate commerce" (setting out the portion of the decision in Gibbons v. Ogden above quoted).

We may call attention also to the language of Justice Miller in Wabash etc. Ry. Co. v. Illinois, 118 U. S. 557, 565; also of the same learned Justice in Chicago etc. Ry. Co. v. Minnesota, 134 U. S. 418, 459: "In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage"; and also the language of Mr. Justice Harlan in Northern Securities Co. v. United States, 193 U. S. 197, 350.

Must this long established power be now so construed as to eliminate the local rate-making power? We have seen that Congress has not so enacted. It has expressly provided that it shall not be. True, that body has not recognized any right in a State directly to
172 hamper or burden interstate commerce; and all courts recognize the supremacy of the federal power to regulate commerce among the States. Whether Congress has the power to forbid indirect interference with commerce among the States, we need not consider; for we do not discover any attempt on its part to exercise such a power. We may now turn to the consideration of some decisions which we think present features of analogy to the present question.

In Louisville & Nashville Rd. Co. v. Eubank, 184 U. S. 27, the validity of Sec. 218 of the Constitution of Kentucky was reaffirmed by the Supreme Court (33):

"We have already held, in the case of Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503 (See 518), that the section of the Kentucky Constitution above set forth, as applied to

places, all of which are within the State, violates no provision of the Federal Constitution."

The action of the commission failed because it attempted to employ an interstate rate between Nashville and Louisville as a standard for determining whether a local rate between points within Kentucky over the same road as that over which the interstate rate prevailed, was a violation of the long and short haul clause of Sec. 2188. It was in effect held that the act of the commission was a direct attempt to regulate interstate commerce. But in answer to a case assumed in argument which supposed several States to have fixed local rates within their respective borders and Congress to have fixed their sum as the rate for interstate commerce, claiming that this did not regulate or interfere with the State rates already, or from time to time adopted by the States, Justice Peckham said (42):

"In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do, and on the other hand the State by such a statute regulates the local rate, but that it has the right to do. Congress does not, directly or indirectly, interfere with local rates, by adopting their sum in the interstate rate".

We take it that we may with propriety say that we do not observe anything laid down in the opinion of the court in that case which is inconsistent with the following language of Justice Brewer, who announced the minority opinion (48):

173 "I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the Legislature of Kentucky may see fit to enforce by simply saying that outside of the State it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing."

It will not escape notice that in the present case the commission fixed the new local rates without reference to any interstate rate or traffic whatever; its action was based solely upon local conditions and local traffic and was in substantial part a restoration of old local rates which the company itself had created and had for years recognized as just and reasonable.

The company in the exercise of its rate-making power changed the local rates which it had previously maintained and included and made them a part of its through rates. Treating the commission as representing the State in the exercise of its power to prescribe local rates, it is clear that certain of the principles laid down in the opinion of the court in the Eubank case and before quoted in part, tend to sustain the order in dispute.

In Louisville & Nashville Rd. Co. v. Kentucky, supra, Justice Shiras said (518):

"It may be that the enforcement of State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power

of the general government to be unlawful must be direct, and not merely the incidental effect of enforcing the police power of a State."

In Mo. Pac. Ry. Co. v. Kansas, before cited (216 U. S. 262), the question was presented whether the railroad company could be compelled by mandamus issued by the State court, to obey an order of the Kansas board of railroad commissioners requiring it to operate a passenger train between a point within the State and the State line. The road in question was built originally as a branch line within the State of Kansas but was operated as a part of a road in Missouri, so that the line in question extended from Madison, Kansas, to Monteith Junction, Missouri, eighty-nine miles being
171 in Kansas and nineteen miles in Missouri. There were no terminal facilities at Monteith Junction, and the trains did not remain over at that point but were run as far as Butler Station, where terminal facilities exist. Among the defenses set up was one that the road was an interstate line and could be operated only as such, and was not subject to the jurisdiction of the State railroad commission for that reason; also that the burden of furnishing such passenger train service would be confiscatory. Two questions were considered by the court, one the alleged arbitrary and unreasonable character of the order, and the other that the order operated as a direct burden upon interstate commerce. Both of these questions were resolved against the company. The order there made was found to be within the power of the commission, and in that feature is analogous to the present order; and, furthermore, the holding that the order did not place a direct burden upon interstate commerce, has an important bearing upon the question now under consideration. The contention respecting the effect of the order upon interstate commerce was disposed of by the present Chief Justice (283):

"But this simply confounds the distinction between State control over local traffic and Federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation. . . ."

Further, speaking of the effect on interstate commerce, the learned Chief Justice said (284):

"The order cannot be said to be an unreasonable exertion of authority because the power manifested was made operative to the limit of the right to do so. Besides the proposition erroneously assumes that the effect of the order is to direct the stoppage at the State line of an interstate train, when, in fact, the order does not deal with an interstate train or put any burden upon such train, but simply requires the operating within the State of a local train, the duty to operate which arises from a charter obligation."

Again, answering a claim that since there were no terminal facilities at the State line the train would have to be operated not only to the State line but twenty miles beyond to Butler, it was
175 said (284):

"But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election

of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

Now, when it is recalled that one of the claims made here is that the reduction of the local rates between points on the south side of the Ohio River (like Louisville, Covington and Newport) and Bardstown will for business or economic reasons necessitate a corresponding reduction of the Jeffersonville and Cincinnati rates to Bardstown, not to speak of points north of those cities, it is hard to distinguish such a claim from that urged by the railroad company in the Kansas case in regard to the absence of terminal facilities at the state line and the consequent necessity to operate twenty miles further to Butler. This latter claim was based alone upon a business or economic reason, but the answer of the Chief Justice was that this "would be at the mere election of the corporation." This answer is equally applicable to the complaint made here. This right of election signifies choice between alternatives, in the sense that either or any one of them may be rightfully selected. The choice is to be exercised by the company. It follows that the burden on interstate rates complained of here is one that may or may not be assumed by the company, according to its financial interests. It does not follow that its averment of a present intent to assume the burden will practically be either a necessary or wise choice of alternatives, much less that the company will continue to carry the burden. The important point however is, that the Supreme Court has declared that such a burden is not in its effect direct.

We do not pass upon the validity of the second order of the commission. We think that the persons and companies in whose favor awards of reparation appear by the order to have been made, are necessary parties in interest. They have not been brought
176 into the suit.

It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant pursuant to the special provision for such review found in Sec. 17 of the Act of June 18, 1910. If the Supreme Court on such review shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremedial injury on account of failure to preserve the *status quo*. Applying the reasons of the rule stated in Hovey v. McDonald, 109 U. S. 150, 161, and further stated in Cotting v. Kansas City Stock Yard Co. *supra* (183 U. S. 79, 80), we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to conditions which will be prescribed in the order to be entered.

In order that the right of appeal directly to the Supreme Court from our decision upon the motion for an interlocutory injunction

may not be embarrassed, we refrain at the present time from passing upon the demurrers.

On a day following, to wit: on the 12th day of January, A. D. 1911, a Supplemental Opinion was filed herein, which was and is in words and figures as follows, viz:

177 In the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Supplemental Opinion.

In the opinion filed January 9th we assumed a certain state of facts not fully stated in the bill, and granted leave to amend the bill accordingly. A Second amended bill, containing paragraph XXI is now tendered for filing. This amendment is much more extensive that we had contemplated, but, upon careful reading and observing the distinction between its statements of facts and its reiteration of argumentative results and legal conclusions, it does not present any question not fully considered in our opinion, and so is not beyond the intention of the leave granted. It may be filed.

January 12, 1911.

J. W. WARRINGTON,
Circuit Judge.
ARTHUR C. DENISON,
District Judge, Specially Assigned.

Filed Jan'y 12, 1911. Chas. N. Wiard, Clerk.

The Second Amended Bill, referred to in the foregoing Supplemental Opinion and filed herein on Jan'y 12, 1911, is in words and figures as follows, viz:

178 In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
v.
ADAM T. SILER et al., Defendants.

Second Amended Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, Louisville & Nashville Railroad Company, brings this its amended bill of complaint against Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, constituting the Railroad Commission of the State of Kentucky, defendants, and thereupon states.

XXI.

That by Section 2 of the Act to regulate commerce it is provided: "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

And complainant states that by Section 3 of said Act it is further provided:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

179 Complainant states that by Section 6 of the Act to regulate commerce, it is provided:

"That every common carrier subject to the provisions of this Act shall file with the commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route."

Again, in the same section of the Act to regulate commerce it is provided:

"No change shall be made in the rates, fares and charges . . . which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public, published as aforesaid, which shall plainly state the change proposed to be made in the schedule then in force and the time when the changed rates, fares and charges will go into effect."

In the same section it is provided:

"No carrier . . . shall charge, or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

The complainant states that the Interstate Commerce Commission has construed these provisions as requiring each interstate carrier to publish and file with the Commission its schedules of rates between different points within a single State where they are factors in the construction of an interstate rate.

Rule No. 5, as shown in Tariff Circular No. 15-A of the Interstate Commerce Commission publishing "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules and Administrative Rulings and Opinions" effective April 15, 1908, is as follows:

"The practice on part of carriers of accepting and transporting through shipments, as to which no joint rate applies, upon rates made up by combination of the rates of the several carriers participating in the movement, and of collecting, as delivering carriers, the aggregate charges of the several carriers upon such shipments, and of accounting to such carriers for their several portions of such charges, is practically universal. That custom has the same binding effect as a joint rate, both as between carriers themselves and as between carriers and shippers. Therefore carriers may apply to through shipments rates to and from stations to and from which there is no applicable published joint rate by using lawfully published bases, locals or proportionals, in connection with other lawfully published tariffs.

Tariffs containing basing or proportional rates must specify clearly the extent and manner of their use, and tariffs that are
180 especially intended for use in connection with published basing rates must show the I. C. C. numbers of tariffs in which bases can be found.

A carrier may provide in its tariffs that, in the absence of a specific rate from point of origin to destination of a through shipment, combination rate to or via certain points will be made upon specified basing point or points, or by using certain specified tariffs or rates, and the combination rate so specified will be the lawful rate for that shipment.

If no specific rate from point of origin to destination of a through

shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the lowest combination of rates applicable via the route over which the shipment moves is the lawful rate for that shipment.

Such combination through rate must be treated as a unit from the date of original shipment to the date of its arrival at destination, and the rate applied must be the combination of the rates which exist upon the date of original shipment. All of the conditions, regulations, and privileges obtaining as to any factor in such combination rate for through shipment at the time of original shipment upon such combination through rate must be adhered to and cannot be varied as to that shipment during the period of transportation of such shipment to its final destination. A local or proportional rate 'in' cannot be absorbed, diminished, or affected by any 'out' rate not in effect at the time when the traffic moved upon such local or proportional rate."

The complainant further states that in the "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules and Administrative Rulings and Opinions" of said Commission, approved June 28, 1909, Tariff Circular 17-A, effective September 1, 1909, page 30, the Interstate Commerce Commission has made the following ruling:

"13. (*h*) Rates for through shipments are often made by adding together two or more rates. All state or other rates used in combination for interstate shipments must be posted at points from which they apply and filed with the Commission, and can only be changed as to such traffic in accordance with the terms of the Act. The Commission believes it proper that all local tariffs be given I. C. C. numbers and be posted and filed with the Commission in manner prescribed in the Act."

The complainant states that the Interstate Commerce Commission in its "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules," last referred to, adopted the following rule which has ever since and is now in full force and effect (Rule 56), to wit:

(*b*) "Many informal complaints are received in connection with regularly established through rates or fares which are in excess of the sum of the locals between the same points. The Commission has no authority to change or fix a rate or fare except after full hearing upon the formal complaint. It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider the through rate or fare which is higher than the sum of the locals between the same points as *prima facie* unreasonable and that the burden of proof would be upon the carrier to defend such higher through rate or fare."

181 Complainant further states that the Interstate Commerce Commission on October 14, 1910, in the matter of application for relief under the fourth section of the Act of June 18, 1910, entered the following order:

"It is further ordered, That the Commission reaffirm its previously

expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is prima facie unreasonable (Rule 56 (*b*) Tariff Circular 17-A) and will insist upon the application of that principle at the earliest possible date in every instance except possible extreme and very unusual cases."

Complainant states it has obeyed and followed these rulings of the Interstate Commerce Commission, where the same were applicable, in the construction of its interstate rates and in the publishing and filing of its tariffs of such rates with that Commission.

Complainant states that the City of Cincinnati, Ohio, is situated on the north side of the Ohio River, which forms the State Line between Ohio and Kentucky, and that complainant's rates from said City situated on the North side of said river at the crossing thereof, for example, from Cincinnati to interior points in Kentucky, are and have always been the same or no higher than from Covington or Newport, Kentucky, immediately opposite on the south side of the Ohio River, to the same interior points in Kentucky on the same kinds of freight or commodities carried in the same quantities and under the same conditions. No difference, in other words, is, or has been, made between the interstate and intrastate rates of the complainant from Cincinnati, or from Covington, or Newport to said interior points in Kentucky.

The Complainant further states that, if the rates fixed by the order of the defendants, constituting the Railroad Commission of Kentucky, dated August 10, 1910, are allowed to go into effect, immediately there will result an unjust discrimination against Cincinnati and all dealers in grain and other commodities used in the manufacture and shipment of whisky located and doing business in that city, who sell and ship the same to the interior stations on
182 complainant's lines in Kentucky named in said order, and they will be subjected at once to "an undue or unreasonable prejudice or disadvantage" and will have to pay the existing interstate rates on said commodities, as set out in complainant's tariffs published and on file with the Interstate Commerce Commission, whereas, like dealers doing business just across the Ohio River or State line, in Covington or Newport, Kentucky, under substantially similar circumstances and conditions, can and will sell and ship the same commodities in the same quantities to the same interior distillery points in Kentucky on complainant's lines at the materially lower rates prescribed in said order, and will, therefore, receive "an undue or unreasonable preference or advantage."

Complainant states that there exists no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order, originating at Covington or Newport, are or would be entitled to be transported to said distillery points at less rates than are in force and covered by said interstate tariffs from those points on interstate shipments coming from without the State of Kentucky, or from Cincinnati.

The complainant further states that what is true of complainant's rates on said articles and commodities at the Cincinnati crossing of

the Ohio river is likewise true of its rates at the Louisville crossing of said river.

The table filed herewith as part hereof marked "Statement No. 1" compiled from the existing official tariffs of complainant on file with the Railroad Commission of Kentucky and the Interstate Commerce Commission, respectively, effective March 25, 1910, ever since and now in force, illustrates what has been above stated with respect to the complainant's present rates, applicable to interstate and intrastate shipments from the Cincinnati crossing of the Ohio river, as compared with the State Commission's rates from Covington and Newport, Kentucky, to the three interior points in Kentucky named in the order of August 10, 1910, on grain and other articles and commodities shipped in quantities as set out in said order, and
183 shows the discriminations created by said order in favor of intrastate traffic and against interstate traffic.

The table filed herewith as part hereof marked "Statement No. 2", compiled from the same sources, shows complainant's rates on said articles and commodities shipped in quantities set out in said order, applicable to interstate and intrastate shipments from the Louisville crossing of the Ohio river, as compared with the State Commission's rates to the 16 interior points in Kentucky named in said order, and shows the discriminations created by said order in favor of intrastate traffic and against interstate traffic.

The table filed herewith as part hereof, marked "Statement No. 3", compiled from the same sources, shows complainant's rates from Cincinnati, applicable on interstate traffic originating there and also at points north of the Ohio river (not on complainant's lines), as well as complainant's present rates from Covington and Newport, Kentucky, applicable on intrastate traffic from the latter points proper, and also on interstate traffic originating at points north of the Ohio river (not on complainant's lines); and the rates ordered by the State Commission applicable on intrastate traffic from Covington and Newport, Kentucky, all to certain distillery stations on complainant's lines in Kentucky, and complainant's existing rates to the same and to all other distillery stations on its lines in that State.

The table filed herewith as part hereof, compiled from the same sources, marked "Statement No. 4", shows complainant's present rates from Louisville, Kentucky, applicable on interstate traffic, originating at points north of the Ohio river (not on complainant's lines), as well as complainant's present rates from Louisville, Kentucky, applicable on intrastate traffic, and the rates ordered by the State Commission applicable on intrastate traffic from Louisville, Kentucky, to certain distillery stations on complainant's lines in Kentucky, and complainant's existing rates to the same and to all other distillery stations on its lines in that State.

184 The complainant further states that at least one-sixth of the total volume or movement of said articles and commodities as set out in said order from Covington and Newport to the 3 interior points in Kentucky named therein, to wit: Bardstown, Coon Hollow and Silver Creek, and from Louisville to the 16 points in the interior of Kentucky named in said order, is and will continue to be in inter-

state commerce, or originates and will originate at points outside of the State of Kentucky, and is and will be transported across the Ohio river at Cincinnati and Louisville to complainant's lines in Kentucky.

Complainant further states that prior to February 10, 1910, its special rates on distillers' supplies, or the articles and commodities set out in said order of August 10, 1910, were applied on both interstate and intrastate traffic to 48 stations in all on complainant's lines in Kentucky, including the 16 named in said order, where distillery plants were, have been since, and are now located, namely:

Athertonville	Eminence	Lotus
Bardstown	Falmouth	Memphis Junction
Berry	Garnett	Morgan
Bloomfield	Gethsemane	Nazareth
Bourbon	Gilbert	New Hope
Boyd	Greenbrier	Campbellsville
Calvary	Levingood	Chapeze
Early Times	Loretto	Chicago
Clermont	Hunters	Robinson
Coon Hollow	Jett	St. Marys
Crab Orchard	Kellers	Samuels
Cynthiana	Kiserton	Shawhan
Dants	Lair	Silver Creek
Deatsville	Lancaster	Silver Springs
Haden	Lebanon	Willow Springs
Hobbs	Poindexter	Withrow;

that from February 10, 1910, to March 25, 1910, its said special rates on distillers' supplies as aforesaid were applied on intrastate traffic to all of said 48 stations; and that since March 25, 1910, complainant's present rates, as covered by the tariffs aforesaid on file with the State Commission and Interstate Commerce Commission, have applied and are still in force from Louisville, Covington and Newport, Kentucky, to all of said 48 stations on such supplies, articles or commodities shipped in quantities as set forth in said order of the Commission.

185 Complainant states that the volume or movement in said supplies, articles and commodities from said cities on the Ohio River to the 32 stations at which such distillery plants are located, other than the 16 named in said order, has heretofore been and will continue to be at least three times as great as the volume or movement of such supplies, articles, or commodities from and through said cities on the Ohio River to the 16 points covered by said Commission's order; and the complainant's loss in revenue, if it is compelled to put in the rates prescribed by said order to said 32 stations from said cities in Kentucky on the Ohio River, will be at least three times as great as its loss in revenue will be on account of having to put in the reduced rates prescribed by said order from said Ohio River cities to the 16 points named in said order, or will be a loss of at least $54,000 annually in its rates, intrastate and inter-

state, on such shipments to said 32 distillery stations, as compared with a loss of at least $18,600 on intrastate and interstate shipments to said 16 distillery stations. These losses will be exclusive of those on shipments of like commodities to consignees other than distillers at said points, which if included, would make the total losses to complainant very much larger per annum.

Complainant further states that at least one half of the volume or movement of such supplies, articles, or commodities to said 32 distillery points has heretofore been and will continue to be in interstate commerce, entering the State of Kentucky at the Cincinnati and Louisville crossings of the Ohio River, and if complainant be compelled to apply the rates prescribed by said order to such interstate shipments to said 32 distillery stations, its loss on its interstate revenues will be at least $27,000 annually, and its loss on its intrastate shipments to said 32 distillery stations will be as much as the last named amount annually.

The complainant states that a large volume of interstate traffic in corn, rye, barley, malt, and other distillers' supplies is constantly moving from points north and west of the Ohio River
186 through Covington and Newport to the distillery stations named in the said order of August 10, 1910, as well as the 32 other distillery stations on complainant's lines in Kentucky, and the through rate charged and collected thereon from points north and west and beyond Cincinnati is and has been the same as the rate from those points of origin to the Ohio river, plus the rate south of the river.

The complainant states that the direct, immediate and necessary operation and effect of the putting into force of the intrastate rates on the commodities as prescribed in said order of August 10, 1910, will be to compel complainant, unless it surrenders its right to transact such interstate commerce business, and gives it up entirely, either, on the one hand, to change and reduce its existing rates (which are just and reasonable and covered by its tariffs on file with the Interstate Commerce Commission, as aforesaid) on interstate shipments of like commodities, originating at Cincinnati and other points outside of Kentucky, north and west of the Ohio River, and entering that State at the Cincinnati or Louisville crossing of the Ohio River, destined to the points named in said order, or, on the other hand, to continue its said rates on interstate shipments in full force and effect without change or reduction, leaving them materially and substantially higher on the same commodities shipped in like quantities from Cincinnati and other points outside of Kentucky for the same distances in Kentucky, or on the south side of the Ohio river, to the same destinations named in said order, thus creating unjust discriminations against shippers of such traffic in interstate commerce by charging, demanding, collecting and receiving from them a greater compensation for the service rendered in the transportation of property than it charges, demands, collects or receives from other shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, as well as giving undue and

unreasonable preferences or advantages to the shippers of
187 such traffic in intrastate commerce in Kentucky, and subjecting such shippers of the same class of traffic to the same destinations from points outside of the State of Kentucky, and the city of Cincinnati and other localities north and west of the Ohio river to undue and unreasonable prejudice and disadvantage in said respects, in violation of the provisions of Sections 2 and 3 of the Act to regulate commerce, hereinabove quoted.

Complainant states that said order of August 10, 1910, is illegal and void because it thus substantially interferes with, burdens and regulates interstate commerce and hampers the enforcement of the Act to regulate commerce, and compels complainant to abandon or surrender the rights which it has under the Constitution and laws of the United States to exercise, and places complainant in such a position that it cannot enjoy its rights and powers under said Constitution and laws in the transportation of interstate traffic and at the same time obey the provisions of the said order.

The complainant further states that it cannot obey the provisions of said order with respect to the 16 distillery stations alone out of the 48 distillery stations in all on its lines in Kentucky without violating the provisions of Section 817, Kentucky Statutes, against unjust discrimination, and the provisions of Section 818, Kentucky Statutes, against making or giving undue or unreasonable preferences or advantages and against creating undue or unreasonable prejudice or disadvantage, and the necessary result of putting in the rates under the Commission's order would be to compel complainant to reduce the intrastate rates proportionately to each of said other 32 stations at which distilleries are located, or to violate the provisions of the Kentucky Statutes aforesaid, and the necessary, immediate and direct burden upon the interstate rates to said 32 distillery stations would similarly be imposed, and as to these complainant would be compelled to surrender its rights under the Constitution and laws of the United States precisely as in the case of the interstate rates to said 16 distillery stations set forth in the Commission's order.

188 Wherefore, Complainant prays as in its original bill as amended, and for all other relief to which it may appear to be entitled.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Attorneys for Complainant.

STATE OF KENTUCKY,
Jefferson County, set:

Personally appeared before me, G. W. B. Olmstead, a Notary Public in and for the County and State aforesaid, W. L. Mapother, First Vice President of the complainant, Louisville & Nashville Railroad Company, and states he knows the contents of the foregoing amended bill; that the facts therein stated as of complainant's own

STATEMENT No. 1.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Comparison of rates ordered by State Commission from Covington and Newport, Ky., applicable on intrastate traffic, with complainant's present rates applicable on interstate traffic from Cincinnati, Ohio, Covington and Newport, Ky., and on intrastate traffic from Covington and Newport, Ky., showing the discrimination created by said orders in favor of intrastate traffic and against interstate traffic.

Commodities.	Destination.	1. Complainant's present rates from Cincinnati, Ohio, applicable on interstate traffic originating at Cincinnati and at other points (not on L. & N. R. R.) north of the Ohio river.	2. Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic and also on interstate traffic originating at points north of the Ohio river not located on the L. & N. R. R.	3. Rates ordered by State commission from Covington and Newport, Ky., applicable on intrastate traffic.	4. Difference in favor of intrastate traffic between rates ordered by State commission from Covington and Newport, applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Cincinnati, Ohio, Covington and Newport, Ky., and on intrastate traffic from Covington and Newport, Ky.	
					Cincinnati, Ohio.	Covington & Newport, Ky.
Barrel & Box Material, K. D., C. L., min. 30,000#. per 100 lbs.	Bardstown, Ky.	11	11	11	..	..
	Coon Hollow, "	12	12	12	..	..
	Silver Creek, "	10	10	10	..	..
Barrel Material, K. D., L. C. L., per 100 lbs.	Bardstown, "	23	28	23	..	5
	Coon Hollow, "	30	34	20.5	9½	13½
	Silver Creek, "	19	19	19	..	..
Barrels, Empty, min. 120 bbls., C. L., per bbl.—(est. wt., 60 lbs.).	Bardstown, "	*a* 13.8	*a* 16.8	14	..	2.8
	Coon Hollow, "	*a* 18	*a* 20.4	14	4	6.4
	Silver Creek, "	*a* 11.4	*a* 11.4	12	..	..
Bottle Caps Metal, Any quantity, per 100 lbs.	Bardstown, "	43	43	43	..	..
	Coon Hollow, "	46	50	37.5	8½	12½
	Silver Creek, "	35	35	35	..	..
Bottle Covers, paper or	Bardstown, "	*b* 23	*b* 28	23	..	5

Bottle Covers, paper or straw, packed or pressed in bales, C. L., min. 15,000, per 100 lbs.	Bardstown, "	*b* 23		*b* 28		23	..	5	
	Coon Hollow, "	*b* 30		*b* 34		20.5	9½	13½	
	Silver Creek, "	*b* 19		*b* 19		19	..	..	
Bottle Covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs.	Bardstown, "	29		32		29	..	3	
	Coon Hollow, "	36		38		33	3	5	
	Silver Creek, "	25		25		*31	..	..	
Bottles, Common, packed, released, C. L., min. 24,000#, per 100 lbs.	Bardstown, "	24		30		25	..	5	
	Coon Hollow, "	32		36		23.5	8½	12½	
	Silver Creek, "	21		21		21	..	..	
Bottles, Common, packed, released, L. C. L., per 100 lbs.	Bardstown, "	35		37		31.5	4½	6½	
	Coon Hollow, "	43		44		28.5	14½	13½	
	Silver Creek, "	31		31		25	6	6	
		C. L., min. 15,000 lbs.	L. C. L.	C. L., min. 15,000 lbs.	L. C. L.		C. L.	L. C. L.	C. L. L. C. L.
Boxes, Empty, Any quantity, per 100 lbs.	Bardstown, Ky.	23	49	28	49	28	..	21	.. 21
	Coon Hollow, "	30	53	34	57	21.5	8½	31½	12½ 35½
	Silver Creek, "	19	40	19	40	19	..	21	.. 21
Corn, Rye, Malt, or Barley, C. L., min. 24,000 lbs., per 100 lbs.	Bardstown, "		16		16	10	6	6	
	Coon Hollow, "		18		18	11	7	7	
	Silver Creek, "		13		13	10	3	3	
Iron, Hoop, C. L., min. 24,000 lbs., per 100 lbs.	Coon Hollow, "		29		29	17	12	12	

AUTHORITIES.

Cincinnati Local No. 2 (I. C. C. No. A-11357), February 17, 1910.
Covington-Newport Local Tariff No. 1 (I.C.C. No. A-11358), intrastate Jan'y 14, 1910, interstate Feb'y 17, 1910.
* Covington 25¢.
a Minimum 10,000 lbs., or 166⅔ bbls.
b Minimum weight 24,000 lbs.

STATEMENT No. 2. SHEET 1.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Comparison of rates ordered by State Commission from Louisville, Ky., applicable on intrastate traffic, with complainant's present rates applicable on interstate traffic from Louisville, Ky., and on intrastate traffic from Louisville, Ky., showing the discrimination created by said orders in favor of intrastate traffic and against interstate traffic.

Commodity.	Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Difference in favor of intrastate traffic between rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Louisville, Ky.
Barrel and Box Material, K. D., C. L., minimum 30,000 lbs., per 100 lbs.	Bardstown,	Ky.	5	5	5	..
	Chapeze,	"	5	5	5	..
	Chicago,	"	5	5	5	..
	Clermont,	"	5	5	5	..
	Coon Hollow,	"	5	5	5	..
	Deatsville,	"	6	6	6	1
	Early Times,	"	5	5	5	..
	Eulinetee,	"	5	5	6	1
	Gethsemane,	"	5	5	5	2
	Greenbrier,	"	5	5	5	..
	Hobbs,	"	5	5	6	1
	Lebanon,	"	5	5	5	..
	Loretto,	"	5	5	6	1
	St. Marys,	"	5	5	5	..
	Samuels,	"	6	6	6	..
	Silver Creek,	"	10	10	10	..
	Bardstown,	Kentucky.	15	15	15	..
	Chapeze,	"	13	13	13	..
	Chicago,	"	22	22	15	7
	Clermont,	"	13	13	13	..
	Coon Hollow,	"	22	22	15	7
	[illegible]	"	15	15	15	..
	[illegible]	"	[illegible]	[illegible]	[illegible]	6

	[illegible]								..
	Coon Hollow,	"	22		22			15	7
	Deatsville,	"	15		15			15	..
Barrel and Box Material, K. D., L. C. L., per 100 lbs.	Early Times,	"	21		21			15	6
	Eminence,	"	17		17			15	2
	Gethsemane,	"	21		21			15	6
	Greenbrier,	"	21		21			15	6
	Hobbs,	"	13		13			13	..
	Lebanon,	"	26		26			15	11
	Loretto,	"	23		23			15	8
	St. Marys,	"	24		24			15	9
	Samuels,	"	15		15			15	..
	Silver Creek,	"	19		19			19	..
	Bardstown,	Kentucky.	9.	Min. 10,000 lbs.	9.	Min. 10,000 lbs.		9	..
	Chapeze,	"	7.8	"	7.8	"		9	..
	Chicago,	"	13.2	"	13.2	"		10	3.2
	Clermont,	"	7.8	"	7.8	"		9	..
	Coon Hollow,	"	13.2	"	13.2	"		10	3.2
Barrels, empty, minimum 120 brls., C. L., per brl. (est. weight 60 lbs. per bbl.).	Deatsville,	"	9.	"	9.	"		9	..
	Early Times,	"	12.6	"	12.6	"		9	3.6
	Eminence,	"	10.2	"	10.2	"		10	.2
	Gethsemane,	"	12.6	"	12.6	"		10	2.6
	Greenbrier,	"	12.6	"	12.6	"		9	3.6
	Hobbs,	"	7.8	"	7.8	"		9	..
	Lebanon,	"	15.6	"	15.6	"		10	5.6
	Loretto,	"	13.8	"	13.8	"		10	3.8
	St. Marys,	"	14.4	"	14.4	"		10	4.4
	Samuels,	"	9.	"	9.	"		9	..
	Silver Creek,	"	11.4	"	11.4	"		12	..

Authority: Louisville Local Tariff No. 1—I. C. C. No. A-11282, effective { Interstate, January 23, 1910. / Intrastate, December 31, 1909.

(Continued on Sheet 2).

Commodity.	Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Difference in favor of intrastate traffic between rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Louisville, Ky.
Bottle Caps, Metal, any quantity, per 100 lbs.	Bardstown,	Kentucky.	23	23	23	..
	Chapeze,	"	20	20	20	..
	Chicago,	"	32	32	26	6
	Clermont,	"	20	20	20	..
	Coon Hollow,	"	32	32	26	6
	Deatsville,	"	23	23	23	..
	Early Times,	"	30	30	23	7
	Eminence,	"	25	25	25	..
	Gethsemane,	"	30	30	26	4
	Greenbrier,	"	30	30	23	7
	Hobbs,	"	20	20	23	..
	Lebanon,	"	39	39	26	13
	Loretto,	"	34	34	26	8
	St. Marys,	"	35	35	26	9
	Samuels,	"	23	23	23	..
	Silver Creek,	"	35	35	35	..
Bottle Covers, paper, or straw packed or pressed in bales, C.L., minimum 15,000 lbs. per car 100 lbs.	Bardstown,	Kentucky.	15 Min. 24,000 lbs.	15 Min. 24,000 lbs.	15	..
	Chapeze,	"	13 "	13 "	13	..
	Chicago,	"	22 "	22 "	15	7
	Clermont,	"	13 "	13 "	13	..
	Coon Hollow,	"	22 "	22 "	15	7
	Deatsville,	"	15 "	15 "	15	..
	Early Times,	"	21 "	21 "	15	6
	Eminence,	"	17 "	17 "	17	..
	Gethsemane,	"	21 "	21 "	15	6
	Greenbrier,	"	21 "	21 "	15	6
	Hobbs,	"	13 "	13 "	15	6

	Silver Creek,	"	19	"	19	"	19	..
Bottle Covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs.	Bardstown,	Kentucky.	17		17		17	..
	Chapeze,	"	15		15		15	..
	Chicago,	"	25		25		25	..
	Clermont,	"	15		15		15	..
	Coon Hollow,	"	25		25		23	2
	Deatsville,	"	17		17		17	..
	Early Times,	"	23		23		20	3
	Eminence,	"	19		19		19	..
	Gethsemane,	"	23		23		20	3
	Greenbrier,	"	23		23		20	3
	Hobbs,	"	15		15		15	..
	Lebanon,	"	31		31		23	8
	Loretto,	"	26		26		23	3
	St. Marys,	"	28		28		23	5
	Samuels,	"	17		17		20	..
	Silver Creek,	"	25		25		31	..
Bottles, common, packed, released, C. L., minimum 24,000 pounds, per 100 lbs.	Bardstown,	Kentucky.	16		16		16	..
	Chapeze,	"	14		14		10	4
	Chicago,	"	24		24		17	7
	Clermont,	"	14		14		14	..
	Coon Hollow,	"	24		24		17	7
	Deatsville,	"	16		16		16	..
	Early Times,	"	22		22		16	6
	Eminence,	"	18		18		18	..
	Gethsemane,	"	22		22		17	5
	Greenbrier,	"	22		22		16	6
	Hobbs,	"	14		14		14	..
	Lebanon,	"	28		28		17	11
	Loretto,	"	25		25		15	10
	St. Marys,	"	26		26		15	11
	Samuels,	"	16		16		16	..
	Silver Creek,	"	21		21		21	..

Authority: Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective, { Interstate, Jan. 23, 1910. / Intrastate, Dec. 31, 1909.

(Continued on Sheet 3.)

STATEMENT No. 2, SHEET No. 3 (Continued from Sheet 2).

Commodity.	Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Difference in favor of intrastate traffic between rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic, and complainant's present rates applicable on interstate traffic from Louisville, Ky.
Bottles, common, packed, released, L. C. L., per 100 lbs.	Bardstown,	Kentucky.	20	20	17	3
	Chapeze,	"	17	17	15	2
	Chicago,	"	28	28	20	8
	Clermont,	"	17	17	17	..
	Coon Hollow,	"	28	28	20	8
	Deatsville,	"	20	20	17	3
	Early Times,	"	27	27	17	10
	Eminence,	"	22	22	22	..
	Gethsemane,	"	27	27	20	7
	Greenbrier,	"	27	27	17	10
	Hobbs,	"	17	17	17	..
	Lebanon,	"	34	34	20	14
	Loretto,	"	30	30	20	10
	St. Marys,	"	31	31	20	11
	Samuels,	"	20	20	17	3
	Silver Creek,	"	31	31	25	6
						C.L. L.C.L.
Boxes, empty, any quantity, per 100 lbs.	Bardstown,	Kentucky.	17 C.L. Min. 26 L.C.L.	15 C.L. Min. 26 L.C.L.	15	.. 11
	Chapeze,	"	13 " 15,000 23 "	13 " 15,000 23 "	15	.. 8
	Chicago,	"	22 " lbs. 37 "	22 " lbs. 37 "	15	7 22
	Clermont,	"	13 " 23 "	13 " 23 "	13	.. 10
	Coon Hollow,	"	22 " 37 "	22 " 37 "	15	7 22
	Deatsville,	"	15 " 26 "	15 " 26 "	15	.. 11
	Early Times,	"	21 " 35 "	21 " 35 "	15	6 20
	Eminence,	"	17 " 29 "	17 " 29 "	17	.. 12
	Gethsemane,	"	21 " 35 "	21 " 35 "	15	6 20
	Greenbrier,	"	21 " 35 "	21 " 35 "	15	6 20
		"	13 " 23 "	13 " 23 "	13	.. 10

lbs.	Gethsemane,	"	21 "	35 "	21 "	35 "	15	6	20
	Greenbrier,	"	21 "	35 "	21 "	35 "	15	6	20
	Hobbs,	"	13 "	23 "	13 "	23 "	13	..	10
	Lebanon,	"	26 "	45 "	26 "	45 "	15	11	30
	Loretto,	"	23 "	39 "	23 "	39 "	15	8	24
	St. Marys,	"	24 "	41 "	24 "	41 "	15	9	26
	Samuels,	"	15 "	26 "	15 "	26 "	15	..	11
	Silver Creek,	"	19 "	40 "	19 "	40 "	19	..	21
Corn, Rye, Malt, or Barley, C. L., minimum 24,000 pounds, per 100 lbs.	Bardstown,	Kentucky.	8	8	5	3
	Chapeze,	"	8	8	5	3
	Chicago,	"	10	10	6	4
	Clermont,	"	8	8	5	3
	Coon Hollow,	"	10	10	6	4
	Deatsville,	"	8	8	5	3
	Early Times,	"	10	10	5	5
	Eminence,	"	9	9	6	3
	Gethsemane,	"	10	10	6	4
	Greenbrier,	"	10	10	5	5
	Hobbs,	"	8	8	5	3
	Lebanon,	"	12	12	6	6
	Loretto,	"	11	11	6	5
	St. Marys,	"	11	11	6	5
	Samuels,	"	8	8	5	3
	Silver Creek,	"	13	13	10	3
Iron, Hoop, C. L., minimum 24,000 lbs., per 100 lbs.	Chapeze,	Kentucky.	13	13	8	5
	Chicago,	"	21	21	12½	8½
	Coon Hollow,	"	21	21	12½	8½
	Eminence,	"	17	17	17	..
	Gethsemane,	"	21	21	12½	8½
	Lebanon,	"	21	21	12½	8½
	Loretto,	"	21	21	12½	8½
	St. Marys,	"	21	21	12½	8½

Authority: L. & N. R. R. Louisville Local Tariff No. 1.
I. C. C. No. A–11282, effective, Intrastate, December 31, 1909.
" Interstate, January 23, 1910.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Statement showing Complainant's Rates from Cincinnati, O., applicable on interstate traffic originating at Cincinnati and also at points north of the Ohio River (not on the L. & N. R. R.): Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic from those points proper and also on interstate traffic originating at points (not on the L. & N. R. R.) north of the Ohio River, and the rates ordered by the State Commission applicable on intrastate traffic from Covington and Newport, Kentucky.

Destination.	1. Complainant's present rates from Cincinnati, O., applicable on interstate traffic originating at Cincinnati and at other points (not on L. & N. R. R.) north of the Ohio river.	2. Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic and also on interstate traffic originating at points north of the Ohio river not located on the L. & N. R. R.	Distance.	3. Rates ordered by State commission from Covington and Newport, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Covington and Newport, Ky., as modified by State commission's order.	Difference in favor of intrastate traffic and against interstate traffic created by State commission's order.
Box and Barrel Material, K. D., C. L., minimum 20,000 lbs., per 100 lbs.						
Falmouth, Ky.	5	5	38	..	5	..
Levingood, Ky.	6	5	42	..	5	..
Morgan, Ky.	6	6	45	..	6	..
Boyd, Ky.	6	6	50	..	6	..
Berry, Ky.	6	6	52	..	6	..
Robinson, Ky.	7	7	55	..	7	..
Garnet, Ky.	7	7	58	..	7	..
Poindexter, Ky.	7	7	60	..	7	..
Kellers, Ky.	7	7	62	..	7	..
Cynthiana, Ky.	7	7	64	..	7	..
Lair, Ky.	8	8	67	..	8	..
Shawhan, Ky.	8	8	71	..	8	..
Kiserton, Ky.	8	8	73	..	8	..
Eminence, Ky.	8	8	94	..	8	..
Silver Springs, Ky.	7	8	103	..	8	..
Jetts, Ky.	7	8	120	..	8	..
Silver Creek, Ky.	10	10	127	10	10	..
Chapeze, Ky.	10	10	132	..	10	..

Chapeze, Ky.	10	10	132	..	10	..
Clermont, Ky.	10	10	133	..	10	..
Hobbs, Ky.	10	10	135	..	11	..
Lotus, Ky.	11	11	137	..	11	..
Deatsville, Ky.	11	11	139	..	11	..
Samuels, Ky.	11	11	141	..	11	..
Bloomfield, Ky.	9	10	141	..	10	..
Lancaster, Ky.	10	10	143	..	10	..
Hunters, Ky.	11	11	144	..	11	..
Nazareth, Ky.	11	11	145	..	11	..
Bourbon, Ky.	11	11	145	..	11	..
Withrow, Ky.	11	11	146	..	11	..
Gilbert, Ky.	11	11	146	..	11	..
Bardstown, Ky.	11	11	147	11	11	..
Haden, Ky.	11	11	149	..	11	..
Early Times, Ky.	12	11	150	..	11	..
Athertonville, Ky.	11	11	152	..	11	..
Greenbrier, Ky.	12	12	153	..	12	..
Gethsemane, Ky.	12	12	156	..	12	..
New Hope, Ky.	12	12	158	..	12	..
Willow Springs, Ky.	12	12	159	..	12	..
Coon Hollow, Ky.	12	12	160	12	12	..
Dants, Ky.	12	12	161	..	12	..
Chicago, Ky.	12	12	163	..	12	..
Loretto, Ky.	11	12	165	..	12	..
St. Marys, Ky.	11	12	170	..	12	..
Crab Orchard, Ky.	11	11	172	..	11	..
Lebanon, Ky.	11	11	175	..	11	..
Calvary, Ky.	14	14	181	..	14	..
Campbellsville, Ky.	14	14	195	..	14	..
Memphis Junction, Ky.	15	15	226	..	15	..

Box and Barrel Material, K. D., L. C. L., per 100 lbs.

Falmouth, Ky.	10	10	38	..	10	..
Levingood, Ky.	10	10	42	..	10	..
Morgan, Ky.	10	10	45	..	10	..
Boyd, Ky.	11	11	50	..	11	..
Berry, Ky.	11	11	52	..	11	..
Robinson, Ky.	12	12	55	..	12	..
Garnet, Ky.	12	12	58	..	12	..
Poindexter, Ky.	12	12	60	..	12	..
Kellers, Ky.	12	12	62	..	12	..
Cynthiana, Ky.	12	12	64	..	12	..
Lair, Ky.	13	13	67	..	13	..
Shawhan, Ky.	13	13	71	..	13	..
Kiserton, Ky.	13	13	73	..	13	..
Eminence, Ky.	24	24	94	..	24	..
Silver Springs, Ky.	15	17	103	..	17	..
Jetts, Ky.	21	15	120	..	15	..
Silver Creek, Ky.	19	19	127	19	19	..
Chapeze, Ky.	21	26	132	..	26	..
Clermont, Ky.	21	26	133	..	26	..
Hobbs, Ky.	21	26	135	..	26	..
Lotus, Ky.	23	28	137	..	28	..
Deatsville, Ky.	23	28	139	..	28	..
Samuels, Ky.	23	28	141	..	28	..
Bloomfield, Ky.	25	28	141	..	28	..
Lancaster, Ky.	22	22	143	..	22	..
Hunters, Ky.	23	28	144	..	28	..
Nazareth, Ky.	23	28	145	..	28	..
Bourbon, Ky.	23	28	145	..	28	..
Withrow, Ky.	23	28	146	..	28	..
Gilbert, Ky.	20	22	146	..	22	..
Bardstown, Ky.	23	28	147	23	23	..
Haden, Ky.	20	22	149	..	22	..
Early Times, Ky.	29	32	150	..	32	..
Athertonville, Ky.	29	32	152	..	32	..
Greenbrier, Ky.	29	33	153	..	33	..
Gethsemane, Ky.	29	34	156	..	34	..
New Hope, Ky.	29	34	158	..	34	..
Willow Springs, Ky.	30	34	159	..	34	..
Coon Hollow, Ky.	30	34	160	20½	20½	9½
Dants, Ky.	30	34	161	..	34	..
Chicago, Ky.	30	34	163	..	34	..
Loretto, Ky.	31	34	165	..	34	..
St. Marys, Ky.	28	34	170	..	34	..
Crab Orchard, Ky.	31	31	172	..	31	..
Lebanon, Ky.	30	30	175	..	30	..
Calvary, Ky.	35	35	181	..	35	..
Campbellsville, Ky.	35	35	195	..	35	..
Memphis Junction, Ky.	38	43	226	..	43	..

Authority: Covington-Newport Local Tariff No. 1—I. C. C. No. A 11358, effective, Interstate, Feb. 17, 1910. Intrastate, Jan. 14, 1910.
Cincinnati Local Tariff No. 2—I. C. C. No. A 11357, effective February 17, 1910.

Destination.		Complainant's present rates from Cincinnati, O., applicable on interstate traffic originating at Cincinnati and at other points (not on L. & N. R. R.) north of the Ohio river.	Complainant's present rates from Covington and Newport, Ky., applicable on intrastate traffic and also on interstate traffic originating at points north of the Ohio river not located on the L. & N. R. R.	Distance.	Rates ordered by State commission from Covington and Newport, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Covington and Newport, Ky., as modified by State commission's order.	Differences in favor of intrastate traffic and against interstate traffic created by State commission's order.
Iron, Hoop, C. L., minimum 24,000 lbs., per 100 lbs.							
Falmouth,	Kentucky.	10	10	38	..	10	..
Levingood,	"	10	10	42	..	10	..
Morgan,	"	10	10	45	..	10	..
Boyd,	"	11	11	50	..	11	..
Berry,	"	11	11	52	..	11	..
Robinson,	"	12	12	55	..	12	..
Garnett,	"	12	12	58	..	12	..
Poindexter,	"	12	12	60	..	12	..
Kellers,	"	12	12	62	..	12	..
Cynthiana,	"	12	12	64	..	12	..
Lair,	"	13	13	67	..	13	..
Shawhan,	"	13	13	71	..	13	..
Kiserton,	"	13	13	73	..	13	..
Eminence,	"	24	24	94	..	24	..
Silver Springs,	"	16	17	103	..	17	..
Jetts,	"	20	10	120	..	10	..
Silver Creek,	"	19	19	127	..	19	..
Chapeze,	"	22	26	132	..	26	..
Clermont,	"	22	26	133	..	26	..
Hobbs,	"	22	26	135	..	26	..
Lotus,	"	24	27	137	..	27	..
Deatsville,	"	24	28	139	..	28	..
Samuels,	"	24	28	141	..	28	..
Bloomfield,	"	25	25	141	..	25	..
Lancaster,	"	20	20	143	..	20	..
Hunters,	"	24	28	144	..	28	..
Nazareth,	"	24	28	145	..	28	..
Bourbon,	**"**	**24**	**28**	**145**	**..**	**28**	**..**

Deatsville,	"	24	28	141	..	28	..	
Samuels,	"	25	25	141	..	25	..	
Bloomfield,	"	20	20	143	..	20	..	
Lancaster,	"	24	28	144	..	28	..	
Hunters,	"	24	28	145	..	28	..	
Nazareth,	"	24	28	145	..	28	..	
Bourbon,	"	24	28	146	..	28	..	
Withrow,	"	19	20	146	..	20	..	
Gilbert,	"	24	28	147	..	28	..	
Bardstown,	"	19	20	149	..	20	..	
Haden,	"	29	28	150	..	28	..	
Early Times,	"	28	28	152	..	28	..	
Athertonville,	"	29	28	153	..	28	..	
Greenbrier,	"	28	28	156	..	28	..	
Gethsemane,	"	28	28	158	..	28	..	
New Hope,	"	29	28	159	..	28	..	
Willow Springs,	"	29	29	160	17	17	12	
Coon Hollow,	"	29	29	161	..	29	..	
Dants,	"	29	29	163	..	29	..	
Chicago,	"	29	29	165	..	29	..	
Loretto,	"	29	29	170	..	29	..	
St. Marys,	"	25	26	172	..	26	..	
Crab Orchard,	"	29	29	175	..	29	..	
Lebanon,	"	30	30	181	..	30	..	
Calvary,	"	30	30	195	..	30	..	
Campbellsville,	"	31	31	226	..	31	..	
Memphis Junction,	"							

Authority: Cincinnati Local Trf. No. 2, I. C. C. A-11357.
Covington-Newport Local Tariff No. 1. I. C. C. A-11358.

Filed Jan. 12, 1911. Chas. N. Wiard, Clerk.

Statement showing complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points north of the Ohio River (not on the L. & N. R. R.), complainant's present rates from Louisville, Ky., applicable on intrastate traffic, and the rates ordered by the State Commission applicable on intrastate traffic from Louisville, Ky.

Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points not on L. & N. R. R. north of Ohio river.	Dist.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Louisville, Ky., as modified by State commission order.	Difference in favor of intrastate traffic and against interstate traffic created by State commission order.
Box and Barrel Material, K. D., C. L. min. 30,000 lbs., per 100 lbs.							
Chapeze,	Ky.	5	24	5	5	5	..
Clermont,	"	5	25	5	5	5	..
Hobbs,	"	5	27	5	5	5	..
Lotus,	"	6	29	6	..	6	..
Deatsville,	"	6	31	6	6	6	..
Samuels,	"	6	33	6	6	6	..
Hunters,	"	6	36	6	..	6	..
Bourbon,	"	6	37	6	..	6	..
Nazareth,	"	6	37	6	..	6	..
Withrow,	"	6	38	6	..	6	..
Bardstown,	"	6	39	6	6	6	..
Eminence,	"	6	40	6	6	6	..
Early Times,	"	7	42	7	6	6	1
Athertonville,	"	7	44	7	..	7	..
Greenbrier,	"	7	45	7	5	5	2
Gethsemane,	"	7	48	7	6	6	1
New Hope,	"	7	50	7	..	7	..
Willow Springs,	"	7	51	7	..	7	..
Coon Hollow,	"	7	52	7	7	7	..
Dants,	"	7	53	7	..	7	..
Chicago,	"	7	55	7	7	7	..
Loretto,	"	7	57	7	7	7	..
Bloomfield,	"	6	57	6	..	6	..
St. Mary's,	**"**	**8**	**62**	**8**	**7**	**7**	**1**
Lebanon.	**"**	**8**	**67**	**8**	**7**	**7**	**1**

Dants,	"	7	33	7	..	7	..
Chicago,	"	7	35	7	7	7	..
Loretto,	"	7	34	7	7	7	..
Bloomfield,	"	6	37	6	..	6	..
St. Mary's,	"	8	62	8	7	7	1
Lebanon,	"	8	67	8	7	7	1
Jetts,	"	7	71	7	..	7	..
Calvary,	"	11	73	11	..	11	..
Campbellsville,	"	11	87	11	..	11	..
Silver Springs,	"	7½	88	7½	..	7½	..
Crab Orchard,	"	10	115	10	..	10	..
Kiserton,	"	10	118	10	..	10	..
Memphis Junction,	"	10	118	10	..	10	..
Shawhan,	"	10	120	10	..	10	..
Lair,	"	10	124	10	..	10	..
Cynthiana,	"	10	127	10	..	10	..
Kellers,	"	10	129	10	..	10	..
Poindexter,	"	10	131	10	..	10	..
Garnett,	"	10	133	10	..	10	..
Robinson,	"	10	136	10	..	10	..
Berry,	"	11	139	11	..	11	..
Boyd,	"	11	141	11	..	11	..
Morgan,	"	11	146	11	..	11	..
Levingood,	"	11	149	11	..	11	..
Falmouth,	"	11	153	11	..	11	..
Silver Creek,	"	10	161	10	10	10	..
Lancaster,	"	10	177	10	..	10	..
Gilbert,	"	11	180	11	..	11	..
Haden,	"	11	183	11	..	11	..

Barrel and Box Material, K. D., L. C. L., per 100 lbs.

Chapeze,	Ky.	13	24	13	13	13	..
Clermont,	"	13	25	13	13	13	..
Hobbs,	"	13	27	13	13	13	..
Lotus,	"	15	29	15	..	15	..
Deatsville,	"	15	31	15	15	15	..
Samuels,	"	15	33	15	15	15	..
Hunters,	"	15	36	15	..	15	..
Bourbon,	"	15	37	15	..	15	..
Nazareth,	"	15	37	15	..	15	..
Withrow,	"	15	38	15	..	15	..
Bardstown,	"	15	39	15	15	15	..
Eminence,	"	17	40	17	15	15	2
Early Times,	"	21	42	21	15	15	6
Athertonville,	"	21	44	21	..	21	..
Greenbrier,	"	21	45	21	15	15	6
Gethsemane,	"	21	48	21	15	15	6
New Hope,	"	21	50	21	..	21	..
Willow Springs,	"	22	51	22	..	22	..
Green Hollow,	"	22	52	22	15	15	7
Dants,	"	22	33	22	..	22	..
Chicago,	"	22	35	22	15	15	7
Loretto,	"	23	34	23	15	15	8
Bloomfield,	"	17	37	17	..	17	..
St. Mary's,	"	24	62	24	15	15	9
Lebanon,	"	26	67	26	15	15	11
Jetts,	"	15	71	15	..	15	..
Calvary,	"	31	73	31	..	31	..
Campbellsville,	"	31	87	31	..	31	..
Silver Springs,	"	17	88	17	..	17	..
Crab Orchard,	"	30	115	30	..	30	..
Kiserton,	"	18	118	18	..	18	..
Memphis Junction,	"	30	118	30	..	30	..
Shawhan,	"	18	120	18	..	18	..
Lair,	"	19	124	19	..	19	..
Cynthiana,	"	19	127	19	..	19	..
Kellers,	"	19	129	19	..	19	..
Poindexter,	"	20	131	20	..	20	..
Garnett,	"	21	133	21	..	21	..
Robinson,	"	21	136	21	..	21	..
Berry,	"	21	139	21	..	21	..
Boyd,	"	21	141	21	..	21	..
Morgan,	"	22	146	22	..	22	..
Levingood,	"	22	149	22	..	22	..
Falmouth,	"	22	153	22	..	22	..
Silver Creek,	"	19	161	19	19	19	..
Lancaster,	"	22	177	22	..	22	..
Gilbert,	"	22	180	22	..	22	..
Haden,	"	22	183	22	..	22	..

Authority: L. & N. R. R. Louisville Local Tarif- No. 1, I. C. C. No. A-11282.

Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points (not on L. & N. R. R.) north of Ohio river.	Distance.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Louisville, Ky., as modified by State commission's order.	Difference in favor of intrastate traffic and against interstate traffic created by State commission's order.
Barrels, empty, minimum 120 bbls., C. L. (estimated weight 60 lbs. per bbl.).							
Chapeze,	Ky.	7.8 Min., 10,000 lbs.	24	7.8 Min., 10,000 lbs.	9	7.8	..
Clermont,	"	7.8 "	25	7.8 "	9	7.8	..
Hobbs,	"	7.8 "	27	7.8 "	9	7.8	..
Lotus,	"	9. "	29	9. "	..	9	..
Deatsville,	"	9 "	31	9 "	9	9	..
Samuels,	"	9 "	33	9 "	9	9	..
Hunters,	"	9 "	36	9 "	..	9	..
Bourbon,	"	9 "	37	9 "	..	9	..
Nazareth,	"	9 "	37	9 "	..	9	..
Withrow,	"	9 "	38	9 "	..	9	..
Bardstown,	"	9 "	39	9 "	14	9	..
Eminence,	"	10.2 "	40	10.2 "	10	10	..
Early Times,	"	12.6 "	42	12.6 "	9	9	3.6
Athertonville,	"	12.6 "	44	12.6 "	..	12.6	..
Greenbrier,	"	12.6 "	45	12.6 "	9	9	3.6
Gethsemane,	"	12.6 "	48	12.6 "	10	10	2.6
New Hope,	"	12.6 "	50	12.6 "	..	12.6	..
Willow Springs,	"	13.2 "	51	13.2 "	..	13.2	..
Coon Hollow,	"	13.2 "	52	13.2 "	10	10	3.2
Dants,	"	13.2 "	53	13.2 "	..	13.2	..
Chicago,	"	13.2 "	55	13.2 "	10	10	3.2
Loretto,	"	13.8 "	57	13.8 "	10	10	3.8
Bloomfield,	"	10.2 "	57	10.2 "	..	10.2	..
St. Marys,	"	14.4 "	62	14.4 "	10	10	4.4
Lebanon,	"	15.6 "	67	15.6 "	10	10	5.6
Jetts,	"	10 Min., 120 bbls.	71	10 Min., 120 bbls.	..	10	..
Calvary,	"	18.6 " 10,000 lbs.	73	18.6 " 10,000 lbs.	..	18.6	..
Campbellsville,	"	18.6 "	87	18.6 "	..	18.6	..
Silver Springs,	"	10.2 "	88	10.2 "	..	10.2	..
Crab Orchard.	"	18 "	115	18 "	..	18	..

Calvary,	"	18.6	" 10,000 lbs.	73	18.6	" 10,000 lbs.	..	18.6	..
Campbellsville,	"	18.6	"	87	18.6	"	..	18.6	..
Silver Springs,	"	10.2	"	88	10.2	"	..	10.2	..
Crab Orchard,	"	18	"	115	18	"	..	18	..
Kiserton,	"	10.8	"	118	10.8	"	..	10.8	..
Memphis Jct.,	"	18	"	118	18	"	..	18	..
Shawhan,	"	10.8	"	120	10.8	"	..	10.8	..
Lair,	"	11.4	"	124	11.4	"	..	11.4	..
Cynthiana,	"	11.4	"	127	11.4	"	..	11.4	..
Kellers,	"	11.4	"	129	11.4	"	..	11.4	..
Poindexter,	"	12	"	131	12	"	..	12	..
Garnett,	"	12.6	"	133	12.6	"	..	12.6	..
Robinson,	"	12.6	"	136	12.6	"	..	12.6	..
Berry,	"	12.6	"	139	12.6	"	..	12.6	..
Boyd,	"	12.6	"	141	12.6	"	..	12.6	..
Morgan,	"	13.2	"	146	13.2	"	..	13.2	..
Levingood,	"	13.2	"	149	13.2	"	..	13.2	..
Falmouth,	"	13.2	"	153	13.2	"	..	13.2	..
Silver Creek,	"	11.4	"	161	11.4	"	12	11.4	..
Lancaster,	"	13.2	"	177	13.2	"	..	13.2	..
Gilbert,	"	13.2	"	180	13.2	"	..	13.2	..
Haden,	"	13.2	"	183	13.2	"	..	13.2	..

Bottle Caps, metal, any quantity, per 100 pounds.

Chapeze,	Ky.	20	24	20	20	20	..
Clermont,	"	20	25	20	20	20	..
Hobbs,	"	20	27	20	23	20	..
Lotus,	"	23	29	23	..	23	..
Deatsville,	"	23	31	23	23	23	..
Samuels,	"	23	33	23	23	23	..
Hunters,	"	23	36	23	..	23	..
Bourbon,	"	23	37	23	..	23	..
Nazareth,	"	23	37	23	..	23	..
Withrow,	"	23	38	23	..	23	..
Bardstown,	"	23	39	23	23	23	..
Eminence,	"	25	40	25	25	25	..
Early Times,	"	30	42	30	23	23	7
Athertonville,	"	30	44	30	..	..	..
Greenbrier,	"	30	45	30	23	23	7
Gethsemane,	"	30	48	30	26	26	4
New Hope,	"	30	50	30	..	30	..
Willow Springs,	"	32	51	32	..	32	..
Coon Hollow,	"	32	52	32	26	26	6
Dants,	"	32	53	32	..	32	..
Chicago,	"	32	55	32	26	26	6
Loretto,	"	34	57	34	26	26	8
Bloomfield,	"	25	57	25	..	25	..
St. Marys,	"	35	62	35	26	26	9
Lebanon,	"	39	67	39	26	26	13
Jetts,	"	27	71	27	..	27	..
Calvary,	"	48	73	48	..	48	..
Campbellsville,	"	48	87	48	..	48	..
Silver Springs,	"	27	88	27	..	27	..
Crab Orchard,	"	45	115	45	..	45	..
Kiserton,	"	33	118	33	..	33	..
Memphis Jct.,	"	47	118	47	..	47	..
Shawhan,	"	34	120	34	..	34	..
Lair,	"	35	124	35	..	35	..
Cynthiana,	"	35	127	35	..	35	..
Kellers,	"	35	129	35	..	35	..
Poindexter,	"	36	131	36	..	36	..
Garnett,	"	37	133	37	..	37	..
Robinson,	"	37	136	37	..	37	..
Berry,	"	38	139	38	..	38	..
Boyd,	"	38	141	38	..	38	..
Morgan,	"	40	146	40	..	40	..
Levingood,	"	40	149	40	..	40	..
Falmouth,	"	40	153	40	..	40	..
Silver Creek,	"	35	161	35	35	35	..
Lancaster,	"	35	177	35	..	35	..
Gilbert,	"	35	180	35	..	35	..
Haden,	"	35	183	35	..	35	..

Authority: Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective—Interstate, January 23, 1910.
Intrastate, December 31, 1909.

STATEMENT 4, SHEET 3.

Destination.		Complainant's present rates from Louisville, Ky., applicable on interstate traffic originating at points (not on L. & N. R. R.) north of Ohio river.	Distance.	Complainant's present rates from Louisville, Ky., applicable on intrastate traffic.	Rates ordered by State commission from Louisville, Ky., applicable on intrastate traffic.	Complainant's present adjustment of intrastate rates from Louisville, Ky., as modified by State commission's order.	Differences in favor of intrastate traffic and against interstate traffic created by State commission's order.
Bottle Covers, paper or straw, packed or pressed in bales, C. L., minimum 15,000 pounds, per 100 pounds.							
		Min. wt., 24,000 pounds.		Min. wt., 24,000 pounds.			
Chapeze,	Ky.	13	24	13	13	13	..
Clermont,	Ky.	13	25	13	13	13	..
Hobbs,	"	13	27	13	15	13	..
Lotus,	"	15	29	15	..	15	..
Deatsville,	"	15	31	15	15	15	..
Samuels,	"	15	33	15	15	15	..
Hunters,	"	15	36	15	..	15	..
Bourbon,	"	15	37	15	..	15	..
Nazareth,	"	15	37	15	..	15	..
Withrow,	"	15	38	15	..	15	..
Bardstown,	"	15	39	15	15	15	..
Eminence,	"	17	40	17	17	17	..
Early Times,	"	21	42	21	15	15	6
Athertonville,	"	21	44	21	..	21	..
Greenbrier,	"	21	45	21	15	15	6
Gethsemane,	"	21	48	21	15	15	6
New Hope,	"	21	50	21	..	21	..
Willow Springs,	"	22	51	22	..	22	..
Coon Hollow,	"	22	52	22	15	15	7
Dants,	"	22	53	22	..	22	..
Chicago,	"	23	55	23	15	15	7
Loretto,	"	17	57	23	15	15	8
Bloomfield,	"	24	62	17	..	17	..
St. Marys,	"	26	67	24	15	15	9
Lebanon,	"	17	71	26	15	15	11
Jetts,	"	31	73	17	..	17	..
Calvary,	**"**			31	..	31	..
Campbellsville,	**"**						

Jetts,	"	17	71	17	..	17	..
Calvary,	"	31	73	31	..	31	..
Campbellsville,	"	31	87	31	..	31	..
Silver Springs,	"	17	88	17	..	17	..
Crab Orchard,	"	30	115	30	..	30	..
Kiserton,	"	18	118	18	..	18	..
Memphis Jct.,	"	30	118	30	..	30	..
Shawhan,	"	18	120	18	..	18	..
Lair,	"	19	124	19	..	19	..
Cynthiana,	"	19	127	19	..	19	..
Kellers,	"	19	129	19	..	19	..
Poindexter,	"	20	131	20	..	20	..
Garnett,	"	21	133	21	..	21	..
Robinson,	"	21	136	21	..	21	..
Berry,	"	21	139	21	..	21	..
Boyd,	"	21	141	21	..	21	..
Morgan,	"	22	146	22	..	22	..
Levingood,	"	22	149	22	..	22	..
Falmouth,	"	22	153	22	..	22	..
Silver Creek,	"	19	161	19	19	19	..
Lancaster,	"	22	177	22	..	22	..
Gilbert,	"	22	180	22	..	22	..
Haden,	"	23	183	22	..	22	..

Bottle Covers, paper or straw, packed or pressed in bales, L. C. L., per 100 pounds.

Chapeze,	Ky.	15	24	15	15	15	..
Clermont,	"	15	25	15	15	15	..
Hobbs,	"	15	25	15	15	15	..
Lotus,	"	17	29	17	..	17	..
Deatsville,	"	17	31	17	17	17	..
Samuels,	"	17	33	17	20	17	..
Hunters,	"	17	36	17	..	17	..
Bourbon,	"	17	37	17	..	17	..
Nazareth,	"	17	37	17	..	17	..
Withrow,	"	17	38	17	..	17	..
Bardstown,	"	17	39	17	17	17	..
Eminence,	"	19	40	19	19	19	..
Early Times,	"	20	42	20	20	20	3
Athertonville,	"	20	44	20	..	20	3
Greenbrier,	"	20	45	20	20	20	3
Gethsemane,	"	20	48	20	20	20	..
New Hope,	"	20	50	20	..	20	..
Willow Springs,	"	20	51	20	20	20	2
Coon Hollow,	"	20	52	20	20	20	..
Dants,	"	20	53	20	20	20	3
Chicago,	"	20	57	20	20	20	..
Loretto,	"	20	57	20	20	20	..
Bloomfield,	"	20	58	20	20	20	8
St. Marys,	"	20	62	20	20	20	..
Lebanon,	"	21	71	21	..	21	..
Jetts,	"	21	73	21	..	21	..
Calvary,	"	21	87	21	..	21	..
Campbellsville,	"	21	88	21	..	21	..
Silver Springs,	"	21	115	21	..	21	..
Crab Orchard,	"	21	118	21	..	21	..
Kiserton,	"	21	118	21	..	21	..
Memphis Jct.,	"	21	120	21	..	21	..
Shawhan,	"	21	124	21	..	21	..
Lair,	"	21	127	21	..	21	..
Cynthiana,	"	21	129	21	..	21	..
Kellers,	"	21	131	21	..	21	..
Poindexter,	"	21	133	21	..	21	..
Garnett,	"	21	136	21	..	21	..
Robinson,	"	21	139	21	..	21	..
Berry,	"	21	141	21	..	21	..
Boyd,	"	21	146	21	..	21	..
Morgan,	"	21	149	21	..	21	..
Levingood,	"	21	153	21	..	21	..
Falmouth,	"	21	161	21	31	21	..
Silver Creek,	"	21	177	21	..	21	..
Lancaster,	"	21	180	21	..	21	..
Gilbert,	"	21	183	21	..	21	..
Haden,	"	25	183	25	..	25	..

Authority: L. & N. R. R. Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective, intrastate, Dec. 31, 1909; interstate, Jan. 23, 1910.

knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

W. L. MAPOTHER.

Subscribed and sworn to before me this the 11th day of January, 1911.

In witness whereof, I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My Commission expires on January 4, 1914.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

(Endorsement:) Lodged with us Jan'y 12, 1911. Denison, D. J. Filed Jan'y 12, 1911. Chas. N. Wiard, Clerk.

The tables filed with 2nd Amended Bill and marked "Statement No. 1," "Statement No. 2," "Statement No. 3," and "Statement No. 4" are as follows, viz:

(Here follow tables marked pages 189 to 204, inclusive.)

205 On the same day, to wit: on the 12th day of January, A. D., 1911, an order was made and entered herein, which said order is in words and figures, as follows, viz:

United States Circuit Court, Eastern District of Kentucky, Frankfort Division.

THURSDAY, *January* 12, 1911.

Court met pursuant to adjournment:

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, and the opinion of the court thereon having been filed on January 9, 1911 and leave for further amendment having been given, and a second amended bill, paragraph XXI having been this 12th day of January, 1911, filed pursuant to such leave, and such second amended bill having been also considered,

It is ordered, that such motion be and is hereby denied.

And it being represented in open court that complainant desires to appeal from the foregoing order, and it appearing that irreparable injury to complainant would result from the denial of such injunction if, upon appeal, such injunction should be granted,

It is further ordered, that the existing restraining order of date September 7, 1910, is continued for the period of thirty days from this date; provided that complainant perform the following four conditions:

206 1. Take and perfect its appeal from this order denying the interlocutory injunction.

2. File with the clerk a complete statement of all freight charges received by it before January 1, 1911, and since August 10, 1910, in excess of the rates fixed by the commission order of that date, and pay into court the total amount of such excess charges. Such statement shall show the names and addresses of all parties paying such excess. Such money paid into court, and subsequent similar payments, shall be refunded to the parties paying the excess, respectively, if it shall finally be determined that such excess was not lawfully collected—otherwise to be returned to the complainant.

3. Thereafter, and on the 15th of each month, commencing February 15, file a similar statement and make a similar payment covering the preceding calendar month,—such monthly statements and payments to be continued until the further order of this court or the Supreme Court.

4. File with the clerk a bond to the United States for the use of such parties as this court may direct, in the penalty of $10,000, with surety approved by the clerk, conditioned for the performance of all the provisions of the preceding paragraph No. 3.

And it is further ordered that such restraining order be and is hereby then further continued until the disposition of the appeal by the Supreme Court and by mandate or until the Supreme Court otherwise order,—unless defendants should make it appear to this court that condition 1, 2 or 4 has not been performed within such thirty days.

207 On a day following, to wit: on the 6th day of February, A. D., 1911, the following order was made and entered herein, which said order is in words and figures as follows, viz:

Court met pursuant to adjournment.

Present: Honorable Henry F. Severens, Circuit Judge.

No. 686.

Louisville & Nashville Railroad Company, Complainant,

v.

Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

This day came the complainant, Louisville & Nashville Railroad Company, and in accordance with the terms of the order entered herein January 12, 1911, filed in court its written statement, signed by Chas. Haydon, Comptroller, showing amounts paid by various consignees and shippers named therein on distillers' supplies, etc., on shipments moving from August 10th, to December 31st, 1910, inclusive, in excess of amounts they would have paid had shipments been charged for on basis of rates as fixed by the Kentucky Railroad Commission's order of August 10th, 1910, the several amounts aggregating for said period the sum of $6,248.49, which was paid into court by the draft of said Comptroller to C. N. Wiard, Clerk of this Court on W. W. Thompson, Treasurer of said Company, which amount the Clerk is ordered to hold, subject to the further order of the Court herein.

The written statement this day filed and referred to in the foregoing order is in words and figures as follows, to wit:

Louisville and Nashville Railroad Company.

Statement showing amounts paid by various consignees and shippers named below on distillers' supplies, etc., on shipments moving from August 10th to December 31st, 1910, inclusive, in excess of amount they would have paid had shipments been charged for on basis of rates as fixed by the Kentucky R. R. Commis-
208 sion's order of August 10th, 1910.

Consignee or shipper.	Address of consignee or shipper and destination.	Amount.
J. M. Atherton & Co.	Coon Hollow	$29.82
M. C. Beam & Co.	Gethsemane	266.73
T. J. Beam	Bardstown	1.39
Bourbon Prince Co.	"	.10
Blair Osbourne & Ballard Dist. Co.	Chicago	68.32
Burk Spring Dist. Co.	Loretto	322.50
Chas. Boldt Glass Co.	Louisville	.20
Brown Foreman Dist. Co.	St. Mary's	366.21
Big Spring Dist. Co.	Coon Hollow	8.41
Coon Hollow Dist. Co.	" "	100.31
R. Cummings & Co.	Loretto	348.75
J. R. Crume	Bardstown	.09
J. B. Dant & Sons	Gethsemane	1.68
H. Ehrman & Co., c/o F. G. Walker	Bardstown	2.84
Eminence Milling Co.	Eminence	21.60
Eminence Dist. Co.	"	410.18
Early Times Dist. Co.	Early Times	579.05
S. Grabfelder	Clermont	20.88
Mose Grabfelder	"	401.91
Greenbrier Dist. Co.	Greenbrier	502.36
Herman Bros.	Louisville	2.07
Helmar Ehrman & Co.	"	1.31
Head & Parker	Gethsemane	134.65
Hume Dist. Co.	Silver Creek	8.09
W. S. Hume & Co.	" "	142.58
W. H. Head Dist. Co.	Chicago	11.29
Moore & Reardon	Bardstown	.52
Murphy Barber & Co.	Clermont	1.45
Mueller Wathen & Kobert	Lebanon	840.97
Tom Moore Dist Co.	Bardstown	60.24
Nelson Co. Liquor Co.	"	1.08
209 Nelson Co. Dist. Co.	Coon Hollow	294.24
Old Saxon Dist. Co.	Chicago	11.44
Old Charter Dist. Co.	Chapeze	17.43
Old Grandad Dist. Co.	Hobbs	60.83
Progress Dist. Co.	Louisville	.50
Paul Jones & Co.	"	2.92
W. B. Samuels & Co.	Samuels	.63
T. W. Samuels Dist.	Deatsville	71.82

Smith Dist. Co.	Chicago	36.19
H. Sutherland & Co.	Bardstown	37.89
C. T. Stewart	"	.19
Frank H. Seubold	Louisville	.57
Taylor & Williams	Gethsemane	438.45
B. Terhune & Sons	Lebanon	14.40
F. G. Walker	Bardstown	5.93
Wright & Taylor	Chapeze	324.79
Warwick Dist. Co.	Silver Creek	32.78
Jno. C. Weller & Co.	Loretto	25.78
Willow Springs Dist.	Coon Hollow	214.13
Total		$6,248.49

Correct:

CHAS. HAYDON,
Comptroller.

The foregoing Statement is endorsed in words and figures as follows, viz:—Filed Feb. 6, 1911, Chas. N. Wiard, Clerk.

On the same day to wit, on the 6th day of February, A. D., 1911, Special Bond required by the order herein of date January 12, 1911, was executed and approved, which said bond is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

210 No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Special Bond.

KNOW all men by these presents: That the undersigned, Louisville & Nashville Railroad Company, as principal, and its surety, The Citizens Trust & Guaranty Company, of West Virginia, a corporation duly incorporated and organized under the laws of said State, and authorized and empowered to become surety on all bonds in judicial proceedings, and to transact business in that State, and in the States of Ohio and Kentucky, are held and firmly bound unto the United States for the use of such parties as the Court may direct, in the above styled cause, in the penalty of Ten Thousand ($10,000) Dollars, to be paid to such parties as the Court may direct, and bind themselves, their successors and assigns, by these presents. Sealed with the official seals of said companies, and dated February 6, 1911.

Whereas, The complainant, Louisville & Nashville Railroad Company, in the above styled suit, has prosecuted an appeal against the defendants therein to the Supreme Court of the United States to reverse the order rendered and entered in said cause on January 12, 1911; and

Whereas, in paragraph 3 of said order, the Court directed and required the complainant, the Louisville & Nashville Railroad Company, in said cause, thereafter, and on the 15th of each month, commencing February 15, 1911, to file a statement, covering the preceding calendar month, of all freight charges received by it in excess of the rates fixed by the order of the Railroad Commission of Kentucky, dated August 10, 1910, and fully described in said suit, and to pay into court the amount of such excess charges for each of such calendar months, such statements to also show the names and addresses of all parties paying such excess, and such monthly statements and payments to be continued until the further order of the court or the Supreme Court of the United States.

211 Now, therefore, the condition of this obligation is such that, if the said complainant shall file said monthly statements and pay the amounts of such excess charges into court, as directed and required by paragraph 3 of the order aforesaid, until the further order of the court or of the Supreme Court in said cause, then this obligation shall be void; otherwise, to remain in full force and virtue.

[SEAL.] LOUISVILLE & NASHVILLE RAILROAD COMPANY.
By W. L. MAPOTHER, *First Vice President.*

Attest:
J. H. ELLIS, *Secretary.*

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA.
By LEONARD L. HARDING, *Att'y-in-Fact.*

The foregoing bond is approved and filed, this February 6, 1911.
CHAS. N. WIARD, *Clerk.*

The foregoing bond is endorsed in words and figures as follows, viz:—Filed Feb'y 6, 1911. Chas. N. Wiard, Clerk.

On the same day, to wit: on the 6th day of February, A. D. 1911, Petition for Appeal was filed herein, which said Petition is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Petition for Appeal to the Supreme Court of the United States.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

Your petitioner, the Louisville & Nashville Railroad Company, complainant and appellant in the above styled cause, conceiving itself aggrieved by the order of this Court, rendered January 12, 1911, denying, after notice and hearing, its application and motion for an interlocutory injunction against the said defendants and ap-
212 pellees herein, does hereby appeal from said order to the Supreme Court of the United States, in accordance with the provisions of Section Seventeen (17) of the Act of the Congress of the United States, entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June 18, 1910, for the reasons and upon the grounds specified in its Assignment of Errors, presented and filed herewith.

Wherefore, your petitioner prays for an order allowing its said appeal, and that a transcript of the record and proceedings, upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, as prescribed by law.

February 6, 1911.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant, Louisville & Nashville Railroad Company.

The foregoing petition is endorsed in words and figures as follows, viz:—Lodged with me this 6th day of February, 1911. H. F. Severens, Circuit Judge. Filed Feb'y 6, 1911. Chas. N. Wiard, Clerk.

On the same day, to wit: on the 6th day of February, A. D. 1911, an Assignment of Errors was filed herein, which is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Assignment of Errors.

And now on this, the 6th day of February, 1911, comes the complainant and appellant, Louisville & Nashville Railroad Com-
213 pany, by William G. Dearing, Albert S. Brandeis and Henry L. Stone, its counsel, and says that in the order rendered by the Court in the above entitled cause on January 12, 1911, denying, after notice and hearing, its application and motion for an interlocutory injunction against said defendants and appellees, in accordance with the prayer of its original bill and the terms and provisions of the restraining order granted September 7, 1910, upon the filing of its said bill herein, and in the record and proceedings in said cause in this court, there is manifest error as set forth in this, its Assignment of Errors, which is presented and filed simultaneously with its Petition for Appeal, and this Court erred in denying its said application and motion, as follows:

I.

In not granting its said application and motion for an interlocutory injunction, because the McChord Act of the Legislature of Kentucky, approved March 10, 1900, entitled "An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions," and the order of August 10, 1910, made by appellees in pursuance of said Act, herein complained of, are violative of the provision of Section One (1) of Article XIV of the Amendments to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and because the enforcement of said order of August 10, 1910, unless enjoined herein, will operate to deprive complainant and appellant of its property without due process of law.

II.

In not granting its said application and motion for an interlocutory injunction, because said McChord Act and said order of
214 August 10, 1910, herein complained of, are violative of the provision of Section One (1) of said Article of the Amend-

ments to the Constitution of the United States, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws, and because the enforcement of said order of the appellees will operate to deny to the appellant the equal protection of the laws.

III.

In denying the said application and motion for an interlocutory injunction on the ground that the appellant cannot invoke the guaranty of the due process clause of the Federal Constitution, or claim that it is violated by the rate order of August 10, 1910, herein complained of, unless it avers and proves that the reduced rates fixed thereby are confiscatory—that is to say, would not yield to it, for the service performed, any profit, or that its entire business would not do so, although it is averred in the bill as amended, and proven by the affidavits filed in support thereof, that the reduced rates prescribed by said order are arbitrary, unjust, unreasonable, discriminatory and will not yield to it a fair or reasonable compensation for the service performed, and will deprive it, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to such service or the public use, with respect to the intrastate traffic involved or carried under the rates thus prescribed.

IV.

In denying said application and motion for an interlocutory injunction on the ground that appellant was not entitled to any judicial review of said rate-making order of the Railroad Commission, to avoid violation of the guaranty of due process provided in the Federal Constitution; that the notice and hearing before said Commission, as provided in the "McChord Act," was all it was lawfully entitled to; and that the order of August 10, 1910,
215 herein complained of, reducing its rates, after such notice and hearing, became (at the expiration of ten days from the mailing of a copy of such order to a representative of the appellant) final, conclusive and of full force and effect.

V.

In not holding the excessive and burdensome penalty provisions of the "McChord Act" are unconstitutional on their face, under the due process and equal protection clauses of the Federal Constitution, and Section 17, of the Constitution of Kentucky, and the order of August 10, 1910, made by the Railroad Commission under said Act, void and unenforcible, and in not granting, on that ground, the application and motion of appellant for an interlocutory injunction against the appellees, enjoining them from enforcing their said order by indictments and prosecutions to recover the penalties provided by said Act, without regard to the insufficiency of the rates prescribed by said order, and notwithstanding the affidavits of two out of three of the members of said Commission dis-

avowing their present purpose to try to enforce said order by criminal proceedings or through the penalties provided in said Act, at least until the validity of said order has been passed upon in a civil suit, when it is their sworn official and statutory duty to institute and prosecute such criminal proceedings against appellant, its officers, agents and employés, for any and all violations of said order

VI.

In holding that appellant is not entitled to complain of the McChord Act on account of the provisions thereof with respect to fines and penalties, where it cannot aver and maintain that the rates prescribed by the Commission's said order are confiscatory.

VII.

In not holding the order complained of is invalid and void because the said Commission is without power or authority (as by said order it undertook to do) to prescribe for observance by appellant rates which are less than the maximum rates it is authorized and empowered to charge and collect by its legislative charter, which charter provision has not been repealed, and constitutes a con-
216 tract between it and the State of Kentucky; and in not holding, on that account, the said order operates to deprive appellant of its property in violation of the due process clause of the Federal Constitution; and also operates to impair the obligation of such contract in violation of the contract clause of Section Ten (10) Article One (1) of the Federal Constitution.

VIII.

In not holding the said "McChord Act" unconstitutional and said rate order of August 10, 1910, void, because said Act undertakes to confer upon the Railroad Commission, an administrative or ministerial body, judicial power and the authority of a court, as well as legislative powers, over and concerning the rates of railroad carriers, and to deprive such carriers of their rate-making power, a property right, without any appeal to or judicial review by any court of the question of the reasonableness of their existing rates, adjudged by said Commission to be extortionate, or of the question of the reasonableness or discriminatory or other illegal nature of the reduced rates prescribed by said Commission, in violation of the provisions of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, both of which judicial and legislative powers said Commission exercised in the proceeding that culminated in the making and promulgation of its said order herein complained of; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said Act and order on that ground.

IX.

In not granting appellant's application and motion for an interlocutory injunction against appellees, as constituting the Railroad

Commission of Kentucky, enjoining them from proceeding to enforce their said rate-making order of August 10, 1910, because said order is arbitrary and void, having been made when no testimony or evidence had been adduced at the hearing or investigation in the proceeding before said Commission, in which said order was
217 entered and promulgated, which established or tended to establish that any of the rates of appellant, which were effective March 25, 1910, and that have been since that date charged, collected and received by it for transportation services on the commodities and between the points named in said order, were or are unjust, unreasonable or extortionate; and because there was no evidence whatsoever introduced in said hearing or investigation or considered by said Commission, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be thereafter charged, collected or received by appellant for the transportation of the commodities from the points of origin to the points of destination named in said order, and the subject-matter of the justness or reasonableness of rates for such transportation of said commodities between said points for all purposes and without regard to the use to which they were to be applied, was coram non judice said Commission at said hearing and investigation, all of which is specifically alleged in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

X.

In not granting appellant's application and motion for an interlocutory injunction enjoining the enforcement by appellees, as constituting said Commission, of their order awarding so-called reparation in sundry sums to the parties, respectively, named in said order dated August 10, 1910, and enjoining the appellee, Adam T. Siler, as the Chairman of said Commission, from filing a certified copy of said order for such reparation in the office of the clerk of the circuit court of any county into or through which run the line or lines of road owned or operated by appellant carrying the freight, as to which the said award of reparation in said order was made, or any other county within the State of Kentucky, on the ground that said order is arbitrary and void, no evidence having been heard or introduced in said investigation, when considered by said Commis-
218 sion showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from appellant on account of previous payment by them, or any of them, of alleged unjust, or unreasonable or extortionate rates, all of which is averred in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

XI.

In not granting appellant's application and motion for an interlocutory injunction, as stated in Paragraph No. X of this Assign-

ment of Errors, and as prayed for in its bill, because there is no valid statute of the State of Kentucky granting power or authority to said Commission to make, promulgate or enforce the said order awarding reparation to the parties instituting the proceeding before it in which said order was entered, Section 829, Kentucky Statutes (the only statutory provision bearing on the subject of reparation) not being applicable to said proceeding under the said "McChord Act," and, if it were, it is unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Federal Constitution, by reason of the qualifying provision therein, with respect to the trial in the circuit court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

"If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence."

XII.

In not holding that the "McChord Act" constitutes an abandonment by the State of Kentucky of a republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over and con-
219 cerning the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and, therefore, void.

XIII.

In not holding that the rate-making order of August 10, 1910, herein complained of, violated the provision of Section 817, Kentucky Statutes, against unjust discrimination, and that complainant cannot obey said order with respect to the 16 distillery stations, constituting the destinations of the commodities named in said order, out of the 48 distillery stations in all on its lines in Kentucky, without violating the provisions of that section and creating an unjust discrimination, as alleged in its second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order.

XIV.

In not holding that the said order of the Railroad Commission violated the provisions of Section 818, Kentucky Statutes, against making or giving an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, and against subjecting any person, company, firm, cor-

poration or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, the facts showing such undue or unreasonable preference or advantage, and such undue or unreasonable prejudice or disadvantage, being alleged in appellant's second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order

XV.

In not holding that the said rate-making order of the Railroad Commission in its operation and enforcement directly, immediately and necessarily interferes with, affects and compels reductions in complainant's existing legal, just and reasonable rates in force March 25, 1910, and ever since, covered by its tariffs published and on file with the Interstate Commerce Commission, on the same commodities, shipped in the same quantities, to the same points of destination on appellant's lines in Kentucky, as stated and set out in said order, from Cincinnati, Ohio, and other points of origin outside of Kentucky, thus resulting in an annual loss, as alleged in the original bill, to appellant on interstate shipments to the 16 distillery stations named in said order of, at least, $3,000, and on intrastate shipments to the same stations of $15,600; and upon the application of the reduced rates prescribed by said order to the shipments of such commodities to the other 32 distillery stations on appellant's lines in Kentucky, resulting in an additional annual loss of, at least, $54,000, one-half of which would be on interstate shipments and the other half on intrastate shipments thereto, as alleged in appellant's second amended bill, and not controverted by answer or otherwise; and in not holding that said order is illegal and void, because in its operation and enforcement it would substantially, directly and necessarily burden and regulate interstate commerce, hamper and prevent the enforcement of the Act to regulate commerce, and compel appellant to abandon or surrender the rights which it has under the Constitution and laws of the United States, and place appellant in such a position it cannot enjoy or exercise its said rights and powers in the transportation of interstate traffic and at the same time obey the provisions of said order, all in violation of the commerce clause of the Federal Constitution, the facts showing which are specifically averred in appellant's bill as amended, and not denied or controverted by answer or otherwise, but admitted by appellees' general demurrer; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said order on that ground.

XVI.

In not holding that said order of August 10, 1910, herein complained of, in its direct and necessary operation and effect upon the rates of appellant as a common carrier by railroad of interstate commerce violates Section 2 of the Act to regulate commerce which pro-

hibits unjust discriminations, and in not, on that ground, granting appellant's application and motion for an interlocutory injunction enjoining its enforcement.

XVII.

In not holding that said rate-making order of the Railroad Commission in its direct and necessary operation and effect upon the rates of appellant as an interstate common carrier by railroad, violates Section 3 of the Act to regulate commerce, which prohibits the making or giving of undue or unreasonable preferences, and the subjection of any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Wherefore, the appellant, Louisville & Nashville Railroad Company, prays that the order of the Circuit Court of the United States for the Eastern District of Kentucky, entered January 12, 1911, denying appellant's application and motion for an interlocutory injunction herein, be reversed, and that said Circuit Court be directed to grant said application and motion for an interlocutory injunction in accordance with the prayer of the original bill as amended, and substantially in the terms of the restraining order of September 7, 1910, issued upon the filing of the original bill.

February 6, 1911.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant.

The foregoing Assignment of Errors is endorsed in words and figures as follows, viz: Filed Feb'y 6, 1911, Chas. N. Wiard, Clerk.

222 On the same day, to wit: on the 6th day of February, A. D., 1911, the following Bond on Appeal was approved and filed herein, which is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Appellees.

Bond on Appeal.

Know all men by these presents: That the undersigned, The Citizens Trust & Guaranty Company, of West Virginia, a corporation duly incorporated and organized under the laws of said State, and

authorized and empowered to become surety on all bonds in judicial proceedings and to transact business in that State, and in the States of Kentucky and Ohio, is held and firmly bound unto Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, in the sum of One Thousand ($1,000) Dollars to be paid to the said Siler, Finn and Tarlton, and binds its successors and assigns, firmly by these presents.

Sealed with the official seal of said Company, and dated February 6, 1911.

Whereas, The appellant, Louisville & Nashville Railroad Company, in the above styled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered and entered in said cause and Court on January 12, 1911.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all costs, if it fails to make said appeal good, then this obligation shall be void; otherwise, to remain in full force and virtue.

[SEAL.] LOUISVILLE AND NASHVILLE RAILROAD CO.,
By W. L. MAPOTHER, *First Vice-Pres.*

Attest:
F. H. ELLIS, *Secretary.*

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,
By LEONARD L. HARDING, *Attorney in Fact.*

223 The foregoing bond is approved, this February 6, 1911.
H. F. SEVERENS,
U. S. Circuit Judge.

Filed February 6, 1911.
CHAS. N. WIARD, *Clerk.*

On the same day, to wit: on the 6th day of February, A. D. 1911, there was filed with said Special Bond and Appeal Bond a Power of Attorney, which is in words and figures as follows, viz:—

Citizens Trust & Guaranty Company of West Virginia hereby constitutes and appoints Leonard L. Harding, of Cincinnati, Ohio, its attorney-in-fact, for the purpose of executing, on its behalf as surety, any supersedeas or appeal bonds, or other bonds which may be required to be given by the Louisville & Nashville Railroad Company in any legal proceedings in any of the courts of the State of Ohio, or State of Kentucky, or in the United States Courts in Ohio, or Kentucky, and it hereby ratifies and confirms the act of its said attorney in signing its corporate name to any such bonds as surety, to all intents and purposes the same as if such bonds had been signed by the Company's proper officers at its home office.

In witness whereof it has caused this instrument to be signed in its behalf by R. J. A. Boreman, its first vice-president, and its cor-

porate seal to be affixed and attested by J. H. Knapp, its secretary, this 2nd day of February, 1911.

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,
By R. J. A. BOREMAN, *First Vice-President.*

Attest:
J. H. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, to wit:

I, Marshall L. Brown, a Notary Public, in and for said county do certify that R. J. A. Boreman personally appeared before me in my said county, and, being by me duly sworn, did depose and say that he is the First Vice-President of Citizens' Trust & Guaranty
224 Company of West Virginia, the corporation described in the writing above bearing date the 2d day of February, 1911 authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the said R. J. A. Boreman acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 2d day of February, 1911.

[SEAL.] MARSHALL L. BROWN,
Notary Public, Wood County, West Va.

My commission expires August 29, 1917.

The foregoing Power of Attorney is endorsed as follows, viz: Filed Feb'y 6, 1911, Chas. N. Wiard, Clerk.

On the same day, to wit: on the 6th day of February, A. D., 1911, an order was made and entered herein, which said order is in words and figures as follows, viz:—

Present: Honorable Henry F. Severens, Circuit Judge.

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

Order Granting Appeal.

The above named complainant, Louisville & Nashville Railroad Company, having prayed an appeal from the order denying its application and motion for an interlocutory injunction, in the above

styled cause, rendered by this Court on January 12, 1911, to the Supreme Court of the United States, and said complainant having presented and filed its Petition for Appeal, together with its Assignment of Errors, and an Appeal Bond and the Special Bond required by said order, which bonds have been duly approved:

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It is now ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record and proceedings upon which said order of January 12, 1911, was made, duly authenticated, be sent to the Supreme Court of the United States, as prescribed by law.

No citation need be issued, the same being waived by Honorable Edward W. Hines, of defendants' counsel, who also consented in open court that the foregoing and all other necessary orders made in perfecting the appeal above mentioned by complainant may be entered and signed, in the absence of Honorable John W. Warrington, Circuit Judge, by Honorable Henry F. Severens, Circuit Judge of the Sixth Circuit.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, Chas. N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing 224 pages and the above lines are a true and complete copy of all the papers filed and proceedings had and entered in the cause, lately pending in the said court wherein The Louisville & Nashville Railroad Company was complainant and A. T. Siler, Lawrence B. Finn and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, were defendants, as the same will appear on file and of record in my office; that I have compared the same with the originals, and it is a true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this the 10th day of February, A. D., 1911, and of the Independence of the United States the 135th year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Endorsed on cover: File No. 22,526. E. Kentucky C. C. U. S. Term No. 905. Louisville & Nashville Railroad Company, appellant, vs. Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting The Railroad Commission of Kentucky. Filed February 15th, 1911. File No. 22,526.

FILED.
MAR 10 1911
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 9[redacted] 1023

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Appellant,*

vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, - - *Appellees.*

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Notice, Motion and Grounds of Appellant to Advance for Hearing.

ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant.

WM. G. DEARING,
Of Counsel.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 905.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellant*,

vs.

ADAM T. SILER, LAWRENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - - - *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

NOTICE, MOTION AND GROUNDS OF APPELLANT TO ADVANCE FOR HEARING.

NOTICE.

To Honorable James Breathitt, Attorney-General of Kentucky, and Honorable Edward W. Hines, Counsel for Appellees:

Please take notice that the undersigned, as counsel for the appellant, will make a motion before the court at the opening of its session on Monday, March 13, 1911, at or about the hour of noon, or as soon thereafter as counsel

can be heard, to advance the above-styled case for hearing at the present term, or as soon as the other business of the court will permit, and in support of said motion will file and present to the court upon the submission of said motion the grounds therefor, a copy of which motion and grounds is herewith served upon each of you. This March 2, 1911.

WILLIAM G. DEARING,
ALBERT S. BRANDEIS,
HENRY L. STONE,
Counsel for Appellant.

Service of the above notice is accepted, and the motion to advance assented to. This March 2, 1911.

JAMES BREATHITT,
Attorney-General of Kentucky.
EDWARD W. HINES,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 905.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellant*,

vs.

ADAM T. SILER, LAWRENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - - - *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION AND GROUNDS TO ADVANCE FOR HEARING.

And now comes the appellant and moves the court to advance this case for hearing at the present term, or as soon as the other business of the court will permit, on the following grounds, to-wit:

1. This suit in equity was instituted September 7, 1910, in the Circuit Court of the United States for the Eastern District of Kentucky against the appellees, individually and as constituting the Railroad Commission

of Kentucky, to enjoin the enforcement of certain orders, which said Commission entered August 10 and promulgated August 31, 1910, in a proceeding before said Commission, wherein the Greenbrier Distillery Company and twenty-two other corporations, organized and existing under the laws of Kentucky, and engaged in the manufacture and shipment of whiskey in that State, had filed a complaint against the appellant, Louisville & Nashville Railroad Company, under the provisions of an act of the Legislature of Kentucky, known as the "McChord Act," approved March 10, 1900, alleging, in substance, that appellant's rates charged and collected since March 25, 1910, for the transportation of corn, rye, barley, malt, and other distillers' supplies, over its lines in Kentucky from Louisville, Covington, and Newport, Kentucky, to sixteen points of destination in that State, at which distillery plants were located, were unjust, unreasonable, and extortionate, and praying that appellant's said existing rates be adjudged unjust, unreasonable, and extortionate, and that, in lieu thereof, said Commission fix just and reasonable rates, not higher than those in force prior to March 25, 1910, and award reparation to said distillery corporations for the amounts alleged to have been paid by them, respectively, after the latter date.

Said Commission held appellant's existing rates on said commodities extortionate, unjust, and unreasonable, and fixed reduced rates, in lieu thereof, for like services thereafter rendered, and awarded reparation to the plaintiffs in accordance with the prayer of their complaint.

Appellant sought to enjoin the enforcement of said orders on various grounds, involving Federal questions, set forth in its bill as amended, but chiefly because the provisions of said McChord Act violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; that the operation of said rate-making order substantially, directly, and necessarily burdens and regulates interstate commerce, hampers and prevents the enforcement of the Act to Regulate Commerce, and compels appellant to abandon or surrender its rights under the Constitution and laws of the United States, and places appellant in such a position it can not enjoy or exercise its said rights and powers in the transportation of interstate traffic and at the same time obey said order; that said order in its direct and necessary operation and effect upon appellant's rates violates Section 2 of the Act to Regulate Commerce, which prohibits unjust discriminations, and Section 3 of the same act, which prohibits the making or giving of undue or unreasonable preferences, and the subjection of any particular person, company, firm or corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever; that the rates prescribed by said order were arbitrary, unjust, unreasonable, and discriminatory, and would not yield to appellant a fair or reasonable compensation for the service performed, and would deprive it, without due process of law, of the fair and reasonable return it is entitled to earn on the value

of the property it devotes to such service or the public use, with respect to the intrastate traffic involved.

2. Appellant for additional grounds for the injunction prayed for alleged the said McChord Act undertook to vest in said Railroad Commission, an administrative or ministerial body, judicial power and authority, as well as legislative powers, over and concerning railroad carriers and rates, and to deprive them of the rate-making power, a property right, without any appeal to or judicial review by any court of the question of the reasonableness of their existing rates, adjudged by said Commission to be extortionate, or of the question of the reasonableness or discriminatory or other illegal nature of the reduced rates prescribed, in violation not only of said provisions of the Federal Constitution and laws, but of Sections 27, 28, 109, and 135 of the Constitution of the State of Kentucky, both of which judicial and legislative powers said Commission exercised in the proceeding that culminated in the promulgation of its said order.

3. Among others, practically all of the questions under the Federal and State Constitutions are made in this case that were made in the case of *Siler, et al.*, v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175-198, except the question on which this court affirmed the decree of the court below, without passing on the constitutional questions involved. On the margin of the report of that case the full text of the McChord Act is set forth.

4. The McChord Act was held to be unconstitutional by the Circuit Court of the United States for the District

of Kentucky (*Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. 216), but its constitutionality was not passed on in the appeal in that case, it being held by this court that it had been prematurely brought. (*McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483.) It is important to all the railroad companies operating lines in Kentucky, as well as to the Railroad Commission, and the public who patronize said lines, that the validity of said act and said rate-making order be determined by this court in the present case as expeditiously as practicable.

5. Upon the filing of appellant's bill in the court below, a restraining order was granted against the appellees, as prayed for, enjoining the enforcement of the order of said Commission herein complained of until the further order of the court, and a day was set for the hearing of appellant's application for an interlocutory injunction. When that time was reached the District Judge, who granted the restraining order for certain reasons which he announced, declined to sit further in this case. Thereupon, one of the circuit judges of the Sixth Circuit was designated to sit therein, and it being suggested to him that Section 17 of the Commerce Court Act, approved June 18, 1910, applied to this case, he, in pursuance of the provisions of that section, called to his assistance to hear and determine appellant's application for an interlocutory injunction herein two district judges of the Sixth Circuit. Said section is as follows:

> That no interlocutory injunction suspending or restraining the enforcement, operation, or execution

of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any circuit court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, However, That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Governor and to the Attorney-General of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such applica-

> tion for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practical day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Oral argument was heard November 3, 1910, and briefs subsequently filed on said application, and thereafter, on January 12, 1911, the said application, by order of the court below, was denied, but appellant was given 30 days in which to perfect its appeal to this court, as provided for by said section of the Act of June 18, 1910, and, meantime, the restraining order aforesaid (on certain terms and conditions, which were duly complied with), was continued in full force and effect during the pendency of this appeal. One of these conditions was that appellant should file a statement showing, and pay into court, subject to its further order, the amounts received by appellant from August 10, 1910, to January 1, 1911, in excess of the rates prescribed by said Commission, which aggregated $6,248.49, and also file a like statement and make like payment into court of the amount of such excess received by it for every month thereafter, beginning with January 1, 1911, pending this appeal, each of which monthly payments will amount to between $3,000 and $4,000.

ALBERT S. BRANDEIS,
HENRY L. STONE,
Attorneys for Appellant.

WILLIAM G. DEARING,
Of Counsel.

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Office Supreme Court, U. S.
FILED.
OCT 9 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. ~~210~~. 23

LOUISVILLE & NASHVILLE RAILROAD COMPANY, -APPELLANT,

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, INDIVIDUALLY and as CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT.

ALBERT S. BRANDEIS,
HENRY L. STONE,
Attorneys for Appellant.

WM. G. DEARING,
Of Counsel.

COURIER-JOURNAL JOB PRINTING CO.

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Supreme Court of the United States

OCTOBER TERM, 1911.

No. 507.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - APPELLANT,

vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, INDIVIDUALLY and as CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This suit in equity was instituted by the appellant, Louisville & Nashville Railroad Company, a common carrier corporation organized and existing under the laws of the State of Kentucky, September 7, 1910, against the appellees, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of said State, to enjoin the enforcement of certain orders entered by said Commission, August 10, and promulgated August 31, 1910. These orders were made in a proceeding before the Commission, wherein

the Greenbrier Distillery Company and twenty-two other corporations, organized and existing under the laws of the State of Kentucky, and engaged in the manufacture and shipment of whiskey, had on May 30, 1910, filed a complaint against the appellant, under the provisions of the McChord Act, hereinafter referred to, alleging, in substance, that appellant's rates charged and collected since March 25, 1910, on its lines of railroad, on corn, rye, barley, malt, barrel and box material, empty barrels and boxes, bottles, bottle caps and covers, hoop iron, etc., when shown to have been used in the manufacture and shipment of whiskey from three points of origin, viz.: Louisville, Covington, and Newport, Kentucky, respectively, to sixteen points of destination, respectively, viz.: Bardstown, Chapeze, Chicago, Clermont, Coon Hollow, Deatsville, Early Times, Gethsemane, Greenbrier, Hobbs, Hunters, Lebanon, Loretto, St. Mary's, Samuel's, and Silver Creek, Kentucky, as shown by Exhibit A, filed with said complaint (Tr. 26), were unjust, unreasonable and extortionate; and alleging that appellant had since March 25, 1910, further received from said distillery corporations divers sums set out in their complaint in excess of just and reasonable rates, consisting of the differences between the rates charged and collected by appellant on said commodities from said three points to said sixteen points *prior* to that date and the rates charged and collected thereon by appellant *since* that date; and praying that appellant's said existing rates be adjudged by said Commission to be unjust, unreasonable and extortionate, that, in lieu thereof, the Commission fix just and reasonable rates, not higher than the rates in force prior to March 25, 1910, and award reparation to said distillery corporations for the amounts alleged to have been paid to appellant by them, respectively, after the latter date. (Tr.

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All the material allegations of the complaint in that proceeding were traversed by the answer of appellant therein, after its motion to strike from the complaint therein all matters relating to reparation, for want of authority to grant the same, had been overruled by the Commission. (Tr. 34-35.)

After a so-called investigation and hearing of the parties, the Commission by the orders complained of herein, granted the prayer of said distillery corporations in all respects, that is to say, the existing rates of appellant on said commodities between the points above mentioned were, without any evidence, as appellant alleges, held to be unjust, unreasonable and extortionate; the former rates were fixed as just and reasonable for like services in the transportation of said commodities, without regard to the uses they were to be put to by the consignees; and awards were made by way of reparation for the several amounts alleged to have been paid after March 25, 1910, in excess of the former rates.

The appellees, constituting the Railroad Commission, claim power and authority to make such orders as are herein complained of under the provisions of the Act of the Kentucky Legislature, commonly called the McChord Act, which is as follows:

> An Act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice by letter mailed to an officer or employe of said Company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

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Section 2. The circuit court of any county into or through which the line or lines of road carrying such passengers or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

Section 3. Prosecutions under this Act shall be by indictment.

Section 4. All prosecutions under this Act shall be commenced within two years after the offense shall have been committed.

Section 5. In making said investigation, said Commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the Chairman of the Commission, approved by the Governor, the Auditor shall draw his warrant upon the treasurer for its payment.

Approved March 10, 1900.

The foregoing Act now constitutes Section 820a, Kentucky Statutes. (Carroll's Edition, 1909.)

By Section 209 of the present Constitution of Kentucky, adopted September 28, 1891, the Railroad Commission was established and provided for as follows:

A commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three Commissioners. During the session of the General Assembly, which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three Commissioners, one from each Superior Court district as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall remain in office during the term of the present Governor, and until their successors are elected, and qualified. At the regular election in eighteen hundred and

ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in Section one hundred and fifty-two of this Constitution. The General Assembly may from time to time change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier, company or corporation, or of any firm or association conducting business as a common carrier, or in any wise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. The General Assembly may, for cause, address any of said Commissioners out of office by similar proceedings, as in the case of judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor.

Prior to the adoption of the present Constitution, the then existing Commission had not been empowered by any constitutional or statutory provision to regulate or fix railroad rates, nor was there any attempt by the Legislature afterward to confer such power upon the Commission established by the Constitution until March 10, 1900, when the McChord Act was passed.

By this Act it will be observed the Legislature undertook, as appellant alleges (Pars. IV, V, VI, Tr. 3-11), to clothe the Commission, when complaint shall be made to it, or when it receives information or has reason to believe that any railroad company is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in Kentucky, with judicial, legislative and executive powers, in violation of Sections 27 and 28 of the State Constitution, which are as follows:

> Section 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> Section 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Sections 109 and 135 of the State Constitution also provide as follows:

> Section 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.
>
> Section 135. No courts, save those provided for in this Constitution, shall be established.

Appellant further alleges (Par. VI, Tr. 6-11), that the said Act undertakes to constitute the Commission an anomalous and unconstitutional body, which with respect to all proceedings or investigations before it concerning rates charged, collected, or received by railroad carriers of freight or passengers, occupies the attitude of complainant, judge, legislator, and prosecutor. In other words, it

may itself be the complainant, or act as the complainant's attorney; as judge, it may try all preliminary questions and then pass on the guilt or innocence of the railroad carrier accused of extortion; as legislator, it may make and fix the compensation of such carrier, thus found by it guilty of extortion, for like services thereafter rendered (without limit as to time); as informer, it may procure indictments by a grand jury for any disobedience by the carrier, or its officers, agents, or employes, of its legislative acts or orders prescribing rates for future services (whether those rates be just or unjust, reasonable or unreasonable); and as prosecutor, it may on the trial of such indictments have imposed in behalf of the State upon such carrier, officer, agent, or employe thus indicted the enormous fines and penalties imposed by the provisions of said Act for such disobedience.

Appellant further alleges that while under the provisions of the State Constitution above referred to, this Commission is not and cannot be a court, no appeal to any court or tribunal possessing judicial powers is allowed or provided for by the McChord Act or any other statute of Kentucky, in behalf of a railroad carrier, from any order of said Commission adjudging such carrier guilty of extortion, or making and fixing what it shall have determined to be a just and reasonable rate, toll, or compensation for such carrier to charge, collect, or receive for like services thereafter rendered, in lieu of the rate, toll, or compensation held by the Commission to be extortionate. In other words, no matter how just or reasonable the existing rate of such carrier may be, or how unjust, unreasonable, arbitrary, confiscatory, or discriminatory the rate fixed by the Commission in lieu thereof may be, its order declaring the former extortionate, and the latter just and reasonable, is by the provisions of the McChord Act made *final and conclusive*, or intended to be so by any

reasonable construction of said Act. In any prosecution by indictment in the circuit court having criminal jurisdiction, the severe fines and penalties imposed by the Act for disregarding the final order of the Commission, or charging, collecting, or receiving a higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by the Commission, neither the carrier, nor its officer, agent, or employe, indicted for the offense of extortion, is by the terms of said Act, or by any other statute of Kentucky, allowed or permitted to interpose or establish by evidence at the trial the defense that the existing rate charged, collected, or received by such carrier is just and reasonable, or that the rate made and fixed by the Commission in lieu thereof is unjust and unreasonable. (Par. VI, Tr. 9-10.)

Appellant further alleges said Act is not only violative of the said sections of the State Constitution, and is, therefore, void, but that it constitutes an abandonment by the State of Kentucky of a republican form of government in so far as it undertakes to vest legislative, executive, and judicial powers of an absolute and arbitrary nature over the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV of the Constitution of the United States, and, therefore, void. (Tr. 10.)

Appellant in its bill also makes the following averments (Tr. 10-11):

> The said Act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions of the Constitu-

tion of the State of Kentucky, is and can be at most only an administrative body or tribunal, and is not and cannot be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said Act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Furthermore, complainant states that said Act, in so far as it attempts to clothe said Railroad Commission with legislative, executive and judicial powers of an arbitrary nature over the property of railroad carriers and the use thereof, is an Act by the State of Kentucky, the enforcement of which operates to deprive such carriers of their property without due process of law, and to deny such carriers the equal protection of the laws, and said Act is, therefore, unconstitutional and void, being in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant further states that said McChord Act has not been construed in any case by the Court of Appeals, the highest court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Constitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdiction, either State of Federal.

It is further averred that the McChord Act is unconstitutional by reason of its penalty provisions (Par. VIII, Tr. 11).

By way of showing how the provisions of this Act, and the Commission's orders in pursuance thereof, operate to deprive a railroad carrier of its property without due pro-

cess of law, and to deny such carrier the equal protection of the laws, appellant further alleges (Par. IX, Tr. 12):

> Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and cannot afford a judicial hearing or determination of such questions brought before it; and, whereas, all other common carriers, in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the provisions of said Act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rate taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said Act, required to make and fix what it may think is a just and reasonable rate, toll or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered, and if such railroad carrier fails or refuses to comply with the rate made and fixed by said Commission, it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply, to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said Act, and thus such railroad carrier is deprived of its property without due process

of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Again, in line with the allegations last quoted, the bill contains averments concerning its property right to initiate its own rates in the State of Kentucky, and to charge and receive for the services it performs just and reasonable compensation (Par. XIII, Tr. 21-22).

Furthermore, it is alleged in the bill that the orders of the Commission herein complained of operate as a regulation, direct interference with, and burden upon, commerce among the States as follows (Par. XII, Tr. 20-21):

> Complainant states that the reduction in its said rates ordered by the Commission, if put into effect, will directly and necessarily interfere with, affect and reduce complainant's existing rates on said commodities shipped to and from stations on its lines in Kentucky to and from stations on its lines outside of Kentucky, as the full amount of complainant's said existing local rates in Kentucky enter into and form a part of its through rates set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910, and remaining on file with that Commission ever since, as required by law, on such interstate shipments of freight belonging to the same classes. The said order made by the Commission, were it to become effective, would not only reduce complainant's said local rates in Kentucky and cause an annual loss to complainant on intrastate freight of at least $15,600, but would directly and necessarily result in reducing complainant's through rates on interstate shipments of such freight, and cause an annual loss to complainant thereon of not less than $3,000. Thus the total reduction in the revenues of complainant directly resulting from the order aforesaid, should the same be put into effect, would be not less than $18,600 per annum. Complainant states that the change in rates and charges directed by the Commission in its order aforesaid would necessarily result in the disturbance, alteration and reduction of interstate rates now and for a long time established on complainant's lines, and

to put into effect said orders would be, to that extent, a direct regulation of interstate commerce and in violation of Clause three (3), Section eight (8), Article one (1), of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate interstate commerce, and this power has been exercised in the Act to amend the Act to Regulate Commerce, approved June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, wherein the power to fix and regulate rates to be charged, collected or received by railroad carriers on interstate freight was delegated to the Interstate Commerce Commission, and since the approval of said Acts of Congress neither the State of Kentucky nor the Kentucky Railroad Commission has any power or authority to regulate or fix rates to be charged, collected or received by railroad carriers so as to directly or indirectly regulate, disturb, interfere with or fix the rates of such carriers on interstate freight or traffic, or to impose any orders, rules, charges or regulations, the necessary result of the enforcement of which would be to affect and regulate commerce between the State of Kentucky and other States, or conflict with the exercise of the powers delegated by the Congress to the Interstate Commerce Commission in the Act aforesaid. Complainant states that the order of the Commission promulgated, as it was, since the passage and approval of said Act of Congress on June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, is in conflict therewith and violates the commerce clause of the Constitution of the United States, the benefit and protection of which complainant relies on and invokes in the premises.

These averments with respect to appellant's interstate rates are elaborated and made more specific in the second amended bill, hereinafter referred to, filed January 12, 1911. (Tr. 113-120.)

The rates fixed by the Commission are one-way flat rates on the commodities mentioned, without reference to the uses or purposes to which they are to be applied by the consignees, whereas the complaint of said distillery corporations before the Commission only challenged the

reasonableness of the existing rates on said commodities *to be used for manufacturing and shipping whiskey.* That alone was the subject-matter of the complaint, the object and prayer of which was to have restored the low special rates on said commodities to be so used in force prior to March 25, 1910. That the orders of the Commission condemning appellant's existing rates as extortionate, and fixing flat rates on said commodities *to be used for any and all purposes, and awarding reparation,* were and are arbitrary, because made without any evidence, and void, as alleged in the bill as follows (Par. XI, Tr. 19):

> There was *no evidence* introduced in said investigation or considered by said Commission showing or tending to show that this complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky or between the points of origin and of destination aforementioned were, in and of themselves, unjust, unreasonable or extortionate; nor was there any evidence introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from this complainant on account of previous payment by them or any of them of alleged unjust or unreasonable or extortionate rates.

Again, to the same effect, are the following allegations (Par. XI, Tr. 19-20):

> Complainant further shows that said written orders of the Commission, dated August 10, 1910, which purport to make and fix rates that may be charged, collected and received by complainant for the transportation of the commodities therein named between the points of origin and destination—all within the State of Kentucky—that are in said written order set forth, are null and void, for the additional reason that said orders do, by their terms, purport to make and to fix rates that may be charged, collected, and received by complainant for the transportation of the commodities named between the

points mentioned, without reference to the uses or purposes to which such commodities were to be applied by the consignees at the points of destination, and that such written orders do, by their terms, make and fix flat rates applicable to the commodities named wholly without regard to the uses or purposes to which such commodities were to be applied by the consignees thereof, whereas, in fact and in law, the only subject-matter that was brought before the Commission for investigation by the Greenbrier Distillery Company and others in the proceeding aforementioned, was the making and fixing of rates for the transportation of the commodities named in said petition to be used by the consignees, being plaintiffs in said proceeding, in their several distilleries at or near the respective points of destination in the production of whiskey and for no other use or purpose whatsoever. This complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting, as aforesaid, the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said orders thereon were and are null and void.

Among other grounds alleged for invoking the interposition of a court of equity is that which seeks to avoid a multiplicity of prosecutions by indictment, that may, and will be found and prosecuted against appellant, its officers, agents, and employes, to recover the excessive fines and penalties imposed by the McChord Act, for charging,

collecting, or receiving a greater or higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by the Commission, and also the numerous suits in the circuit courts of the various counties upon the several awards wrongfully and illegally made by the Commission. (Pars. XIV, XV and XVI, Tr. 22-24.)

It is also alleged that appellant had no adequate remedy at law. (Tr. 24.)

Upon the filing of the bill, His Honor, Judge Cochran, granted a restraining order as prayed for, a certified copy of which was duly executed upon each of the appellees, and the same was by its terms to remain in full force and effect until a hearing was had upon the application for an interlocutory injunction and the further order of the court in the premises. (Tr. 40-42.)

The application for such injunction was in said restraining order set for hearing on September 26, 1910, that being the first day of the next regular term of the court below at Frankfort, Kentucky.

Upon the calling of the cause in court at the time and place stated, the appellant, in support of its said application, beside its bill as amended verified by A. R. Smith, its third vice president, filed the affidavits of C. B. Compton, its traffic manager, and D. M. Goodwyn, its general freight agent, and appellees in opposition to said application, filed their demurrer to the whole bill, and their demurrer to part of the bill, and the affidavits of the appellees, Adam T. Siler and Lawrence B. Finn, and also the affidavits of W. A. Miller and R. H. Edelen, the former vice president of Wright & Taylor, and the latter president of the Mattingly & Moore Distillery Company, two of the distillery corporations which joined in the complaint in the proceeding before said Commission, which resulted in the making and promulgation of the orders herein complained of.

Thereupon, Judge Cochran announced in open court that on account of his prior connection with two other cases involving the question of the constitutionality of the McChord Act, he would decline to sit in this case, and would certify his unwillingness to do so to the presiding circuit judge of the Sixth Circuit. (Tr. 44.)

Afterward, His Honor, Circuit Judge Warrington, was duly assigned to sit in this case, and it being suggested to him by counsel for appellees that Section 17 of the Commerce Court Act, approved June 18, 1910, applied to this case, he, in pursuance of the provisions of that section, called to his assistance to hear and determine appellant's application for an interlocutory injunction District Judges Sanford and Denison of the Sixth Circuit.

Section 17 of the Commerce Court Act, approved June 18, 1910, effective sixty days after its passage, is as follows:

> That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall

be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the State, and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

The appellant's said application and appellee's demurrers were subsequently set for oral argument on November 3, 1910, at Covington, Kentucky, before the three judges named. Upon the calling of the cause at that hearing, the appellant tendered, and, without objection by appellees, was permitted to file its amended bill of complaint, to which appellees filed their demurrer to the whole bill as amended.

Counsel for the parties having orally argued the questions involved, the case was submitted on appellant's application for an interlocutory injunction and on appellees' demurrers to the original bill, and the bill as amended, disth leave to print a transcript of the record and furnish the members of the court copies thereof, together with in the' briefs of counsel for each party by November 25, complainTr. 74-75.)

The amended bill filed on November 3, 1910, sets out the different lines of appellant, owned and operated in Kentucky, on August 10, 1910, and since that date, located in fifty-seven (57) counties, and aggregating 1,527.97 miles of main track; and the average total mileage of the lines owned and operated by it in that State and other States during the fiscal year ended June 30, 1910, and on August 10, 1910, being 4,590.55. (Par. XVIII, Tr. 75-78.)

In its said amended bill appellant also set up and relied on the existing contract between the State and itself contained in the provisions of its charter granting it the right to charge certain maximum freight and passenger rates, which freight rates are in excess of the rates condemned by the Commission as extortionate; and alleges that while said contract is subject to revocation or repeal, it has never been revoked or repealed by the Legislature. (Par. XIX, Tr. 79-80.)

The nature and effect of the Commission's order complained of herein and some of the facts sustaining appellant's contention that the rates prescribed by that order are arbitrary, unjust, unreasonable, discriminatory, and illegal are specifically stated in the concluding paragraph of its amended bill. (Par. XX, Tr. 80-82.)

Among other grounds stated in that amended bill, in connection with the allegations of the original bill, raising Federal questions, are these (Par. XX, Tr. 81-82):

> 4. The enforcement of the rates prescribed in said order will bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points in other States and transported between the same points in Kentucky, thus placing a burden on interstate commerce, or else to apply the said rates, without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.
>
> 8. The enforcement of said order will compel complainant to accept upon interstate as well as in-

trastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, and which will not yield to complainant a fair or reasonable compensation for the services performed, and will deprive complainant, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The enforcement of the rates fixed by said order would compel complainant to charge and receive a less rate or compensation for the transportation of property of like kind, both intrastate and interstate traffic, for a longer haul than for a shorter haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States, unless relieved therefrom by the further order of the Railroad Commission of said State and the order of the Interstate Commerce Commission.

After the submission of the case on November 3, 1910, the court below on January 9, 1911, delivered its written opinion, wherein appellant's motion for an interlocutory injunction was denied, but the restraining order of September 7, 1910, was continued in force until an opportunity had been given for appellant to secure a review subject to conditions, which were to be prescribed in an order thereafter to be entered. (See Opinion, Tr. 85-112; 186 Fed. 176-204.) In order, as the court stated in its said opinion, that the right of appeal directly to this court from its decision on the motion for an interlocutory injunction might not be embarrassed, the court below refrained at that time from passing on the demurrers. (Tr. 111-112.)

In the course of its opinion the court, with respect to so much of appellant's bill as alleged the rates fixed by the

Commission in the order complained of, if enforced, would directly and necessarily interfere with and operate to reduce appellant's interstate rates on the same commodities, and amount to a regulation and a burden upon interstate commerce, stated (Tr. 105-6; 186 Fed. 197-8):

> One averment in form is that the McChord Act "is an express and direct interference with and regulation of interstate commerce" (Par. IX of Bill). We have no hesitancy in saying that the Act is not open to any such interpretation; nor in affirming that nothing is to be found in the rate order in dispute or in any fact either averred or shown, tending to disclose a design on the part of the Commission to interfere with or to regulate interstate commerce. When we consider the bill and affidavits in connection with assertions made in the brief of complainant, we infer that it is intended to set up general classes of facts and specific facts as follows: A certain volume of interstate traffic, in corn, rye, barley, malt and other distillers' supplies, is constantly moving from points north of the Ohio River through Covington or Newport to some of the interior points named in the order. Some of this originates at Cincinnati, some further north. The existing through rate from Cincinnati is and has been the same as from Covington or Newport, and the through rate from points north of and beyond Cincinnati is and has been the same as the rate from those points to the Ohio River, plus the rate south of the river. A car of rye from Cincinnati to Bardstown, Ky., is typical of this through traffic, and upon this car (minimum) the present rate from Cincinnati would be $38.40, and the new rate from Covington would be $24.00. The fair and reasonable charge for transporting this car from Cincinnati to Covington would not exceed (for example) $5.00. Under the new rates this carload could be shipped from Cincinnati to Bardstown for not to exceed $29.00. As a matter of fact, we infer it is meant to say, all through shipments of such cars from Cincinnati to Bardstown would cease unless complainant should, as it would for business reasons, reduce the through rates to (for example) $29.00. A substantially similar state of facts exists at the Louisville gateway with reference to Louisville and Jeffersonville. (This state of facts is made to appear by tables set out in

the brief.) It is averred that the enforcement of the new rates will cause an annual loss of $15,600 to complainant in its rates on local shipments, and a further annual loss of $3,000 in its rates on interstate shipments; and it is stated by affidavit that there are no through rates on the articles in question from points outside the State to points within the State, such charges being assessed by combining the rates from points of origin to Louisville, to Covington or to Newport (at which points such shipments enter the State) with the rates from those points to the point of destination in Kentucky.

Since it is to the interest of both parties to this case that the actual facts should be made to appear by proper pleadings, we have concluded to say that the complainant may, if it sees fit, amend its bill so far as it truthfully can aver the facts just recited and which we infer from the sources of information before pointed out to exist.

In pursuance of the leave thus granted, appellant tendered its second amended bill January 12, 1911, elaborating and making the averments of the original bill with respect to the interference and burden on interstate commerce more definite, specific and certain, which the court below, in a written supplemental opinion, permitted to be filed. (Tr. 112-121.)

On the same day, after considering the additional averments contained in said second amended bill, the court entered its order denying appellant's motion for an interlocutory injunction, but continuing the restraining order in force on certain terms and conditions as follows (Tr. 122-3):

This cause having come on to be heard upon the motion of complainant for an interlocutory injunction and having been considered, and the opinion of the court thereon having been filed on January 9, 1911, and leave for further amendment having been given, and a second amended bill, paragraph XXI having been this 12th day of January, 1911, filed pursuant to such leave, and such second amended bill having been also considered,

It is ordered, that such motion be and is hereby denied.

And it being represented in open court that complainant desires to appeal from the foregoing order, and it appearing that irreparable injury to complainant would result from the denial of such injunction if, upon appeal, such injunction should be granted,

It is further ordered, that the existing restraining order of date September 7, 1910, is continued for the period of thirty days from this date; provided that complainant perform the following four conditions:

1. Take and perfect its appeal from this order denying the interlocutory injunction.

2. File with the clerk a complete statement of all freight charges received by it before January 1, 1911, and since August 10, 1910, in excess of the rates fixed by the Commission's order of that date, and pay into court the total amount of such excess charges. Such statement shall show the names and addresses of all parties paying such excess. Such money paid into court, and subsequent similar payments, shall be refunded to the parties paying the excess, respectively, if it shall finally be determined that such excess was not lawfully collected—otherwise to be returned to the complainant.

3. Thereafter, and on the 15th of each month, commencing February 15, file a similar statement and make a similar payment covering the preceding calendar month,—such monthly statements and payments to be continued until the further order of this court or the Supreme Court.

4. File with the clerk a bond to the United States for the use of such parties as this court may direct, in the penalty of $10,000, with surety approved by the clerk, conditioned for the performance of all the provisions of the preceding paragraph No. 3.

And it is further ordered that such restraining order be and is hereby then further continued until the disposition of the appeal by the Supreme Court and by mandate or until the Supreme Court otherwise order—unless defendants should make it appear to this court that condition 1, 2 or 4 has not been performed within such thirty days."

Thereafter, on February 6, 1911, in pursuance of said order, appellant filed its written statement showing the amounts paid by various consignees and shippers named

therein on distillers' supplies, etc., on shipments moving from August 10 to December 31, 1910, inclusive, between the points above mentioned, in excess of the amounts they would have paid had such shipments been charged for on the basis of rates as fixed by said Commission's order, aggregating for said period $6,248.49, which sum was paid into court. (Tr. 123-25.)

Appellant also then executed the special bond in the sum of $10,000, in pursuance of the terms imposed by the order appealed from, by the covenants of which appellant and its surety are obligated to file statements thereafter on the 15th of each month, commencing with February 15, 1911, covering the preceding calendar month, showing all freight charges received by appellant in excess of the rates fixed by said Commission's order of August 10, 1910, and to pay into court the amount of such excess charges; such statements to also show the names and addresses of all parties paying such excess; and to continue to file such monthly statements and make such payments into court until the further order of the court below or of this Court. (Tr. 125-6.)

Appellant likewise at the same time filed its petition for appeal to this court, assignment of errors, and executed its appeal bond, which the court approved, allowed the appeal prayed for, and thereupon citation was waived in open court by counsel of record for appellees. (Tr. 127-137.)

The errors assigned are as follows (T. 128-134):

ASSIGNMENT OF ERRORS.

And now on this, the 6th day of February, 1911, comes the complainant and appellant, Louisville & Nashville Railroad Company, by William G. Dearing, Albert S. Brandeis, and Henry L. Stone, its counsel, and says that in the order rendered by the court in the above entitled cause on January 12, 1911, denying, after notice and hearing, its application and motion for an interlocutory injunction against said defendants and appellees, in accordance with the prayer of its original bill and the terms and provisions of the restraining order granted September 7, 1910, upon the filing of its said bill herein, and in the record and proceedings in said cause in this court, there is manifest error as set forth in this, its assignment of errors, which is presented and filed simultaneously with its petition for appeal, and this court erred in denying its said application and motion, as follows:

I.

In not granting its said application and motion for an interlocutory injunction, because the McChord Act of the Legislature of Kentucky, approved March 10, 1900, entitled "An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions," and the order of August 10, 1910, made by appellees in pursuance of said Act, herein complained of, are violative of the provision of Section One (1) of Article XIV of the Amendments to the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and because the enforcement of said order of August 10, 1910, unless enjoined herein, will operate to deprive complainant

and appellant of its property without due process of law.

II.

In not granting its said application and motion for an interlocutory injunction, because said McChord Act and said order of August 10, 1910, herein complained of, are violative of the provision of Section One (1) of said Article of the Amendments to the Constitution of the United States, which prohibits any State from denying to any person within its jurisdiction, the equal protection of the laws, and because the enforcement of said order of the appellees will operate to deny to the appellant the equal protection of the laws.

III.

In denying the said application and motion for an interlocutory injunction on the ground that the appellant cannot invoke the guaranty of the due process clause of the Federal Constitution, or claim that it is violated by the rate order of August 10, 1910, herein complained of, unless it avers and proves that the reduced rates fixed thereby are confiscatory—that is to say, would not yield to it, for the service performed, any profit, or that its entire business would not do so, although it is averred in the bill as amended, and proven by the affidavits filed in support thereof, that the reduced rates prescribed by said order are arbitrary, unjust, unreasonable, discriminatory, and will not yield to it a fair or reasonable compensation for the service performed, and will deprive it, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to such service or the public use, with respect to the intrastate traffic involved or carried under the rates thus prescribed.

IV.

In denying said application and motion for an interlocutory injunction on the ground that appellant was not entitled to any judicial review of said rate-making order of the Railroad Commission to avoid violation of the guaranty of due process pro-

vided in the Federal Constitution; that the notice and hearing before said Commission, as provided in the "McChord Act," was all it was lawfully entitled to; and that the order of August 10, 1910, herein complained of, reducing its rates, after such notice and hearing, became (at the expiration of ten days from the mailing of a copy of such order to a representative of the appellant) final, conclusive and of full force and effect.

V.

In not holding the excessive and burdensome penalty provisions of the "McChord Act" are unconstitutional on their face, under the due process and equal protection clauses of the Federal Constitution, and Section 17 of the Constitution of Kentucky, and the order of August 10, 1910, made by the Railroad Commission under said Act, void and unenforcible, and in not granting, on that ground, the application and motion of appellant for an interlocutory injunction against the appellees, enjoining them from enforcing their said order by indictments and prosecutions to recover the penalties provided by said Act, without regard to the insufficiency of the rates prescribed by said order, and notwithstanding the affidavits of two out of three of the members of said Commission disavowing their present purpose to try to enforce said order by criminal proceedings or through the penalties provided in said Act, at least until the validity of said order has been passed upon in a civil suit, when it is their sworn official and statutory duty to institute and prosecute such criminal proceedings against appellant, its officers, agents and employes, for any and all violations of said order.

VI.

In holding that appellant is not entitled to complain of the McChord Act on account of the provisions thereof with respect to fines and penalties, where it cannot aver and maintain that the rates prescribed by the Commission's said order are confiscatory.

VII.

In not holding the order complained of is invalid and void because the said Commission is without power or authority (as by said order it undertook to do) to prescribe for observance by appellant rates which are less than the maximum rates it is authorized and empowered to charge and collect by its legislative charter, which charter provision has not been repealed, and constitutes a contract between it and the State of Kentucky; and in not holding, on that account, the said order operates to deprive appellant of its property in violation of the due process clause of the Federal Constitution; and also operates to impair the obligation of such contract in violation of the contract clause of Section Ten (10), Article One (1) of the Federal Constitution.

VIII.

In not holding the said "McChord Act" unconstitutional and said rate order of August 10, 1910, void, because said Act undertakes to confer upon the Railroad Commission, and administrative or ministerial body, judicial power and the authority of a court, as well as legislative powers, over and concerning the rates of railroad carriers, and to deprive such carriers of their rate-making power, a property right, without any appeal to or judicial review by any court of the question of the reasonableness of their existing rates, adjudged by said Commission to be extortionate, or of the question of the reasonableness or discriminatory or other illegal nature of the reduced rates prescribed by said Commission, in violation of the provisions of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, both of which judicial and legislative powers said Commission exercised in the proceeding that culminated in the making and promulgation of its said order herein complained of; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said Act and order on that ground.

IX.

In not granting appellant's application and motion for an interlocutory injunction against appellees,

as constituting the Railroad Commission of Kentucky, enjoining them from proceeding to enforce their said rate-making order of August 10, 1910, because said order is arbitrary and void, having been made when no testimony or evidence had been adduced at the hearing or investigation in the proceeding before said Commission, in which said order was entered and promulgated, which established or tended to establish that any of the rates of appellant, which were effective March 25, 1910, and that have been since that date charged, collected and received by it for transportation services on the commodities and between the points named in said order, were or are unjust, unreasonable or extortionate; and because there was no evidence whatsoever introduced in said hearing or investigation or considered by said Commission, which showed or tended to show in the slightest degree what was or might be a just and reasonable rate to be thereafter charged, collected or received by appellant for the transportation of the commodities from the points of origin to the points of destination named in said order, and the subject-matter of the justness or reasonableness of rates for such transportation of said commodities between said points for all purposes and without regard to the use to which they were to be applied, was *coram non judice* said Commission at said hearing and investigation, all of which is specifically alleged in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

X.

In not granting appellant's application and motion for an interlocutory injunction enjoining the enforcement by appellees, as constituting said Commission, of their order awarding so-called reparation in sundry sums to the parties, respectively, named in said order dated August 10, 1910, and enjoining the appellee, Adam T. Siler, as chairman of said Commission, from filing a certified copy of said order for such reparation in the office of the clerk of the circuit court of any county into or through which run the line or lines of road owned or operated by appellant carrying the freight, as to which the said award of reparation in said order was made, or any other

county within the State of Kentucky, on the ground that said order is arbitrary and void, no evidence having been heard or introduced in said investigation, when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from appellant on account of previous payment by them, or any of them, of alleged unjust, or unreasonable or extortionate rates, all of which is averred in appellant's bill, and not denied by answer or contradicted by the affidavits filed by appellees, but was admitted by their general demurrer to the bill.

XI.

In not granting appellant's application and motion for an interlocutory injunction, as stated in paragraph No. X of this assignment of errors, and as prayed for in its bill, because there is no valid statute of the State of Kentucky granting power or authority to said Commission to make, promulgate or enforce the said order awarding reparation of the parties instituting the proceeding before it in which said order was entered, Section 829, Kentucky Statutes (the only statutory provision bearing on the subject of reparation) not being applicable to said proceeding under the said "McChord Act," and, if it were, it is unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Federal Constitution, by reason of the qualifying provision therein, with respect to the trial in the circuit court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

"If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence."

XII.

In not holding that the "McChord Act" constitutes an abandonment by the State of Kentucky of a

republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over and concerning the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and, therefore, void.

XIII.

In not holding that the rate-making order of August 10, 1910, herein complained of, violated the provision of Section 817, Kentucky Statutes, against unjust discrimination, and that complainant cannot obey said order with respect to the 16 distillery stations, constituting the destinations of the commodities named in said order, out of the 48 distillery stations in all on its lines in Kentucky, without violating the provisions of that section and creating an unjust discrimination, as alleged in its second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order.

XIV.

In not holding that the said order of the Railroad Commission violated the provisions of Section 818, Kentucky Statutes, against making or giving an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, and against subjecting any person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, the facts showing such undue or unreasonable preference or advantage, and such undue or unreasonable prejudice or disadvantage, being alleged in appellant's second amended bill, and not denied by answer or contradicted by the affidavits filed by appellees; and in not, on that ground, granting appellant's application and motion for an interlocutory injunction against appellees enjoining the enforcement of said order.

XV.

In not holding that the said rate-making order of the Railroad Commission in its operation and enforcement directly, immediately and necessarily interferes with, affects and compels reductions in complainant's existing legal, just and reasonable rates in force March 25, 1910, and ever since, covered by its tariffs published and on file with the Interstate Commerce Commission, on the same commodities, shipped in the same quantities, to the same points of destination on appellant's lines in Kentucky, as stated and set out in said order, from Cincinnati, Ohio, and other points of origin outside of Kentucky, thus resulting in an annual loss, as alleged in the original bill, to appellant on interstate shipments to the 16 distillery stations named in said order of, at least $3,000, and on intrastate shipments to the same stations of $15,600; and upon the application of the reduced rates prescribed by said order to the shipments of such commodities to the other 32 distillery stations on appellant's lines in Kentucky, resulting in an additional annual loss of, at least, $54,000, one-half of which would be on interstate shipments and the other half on intrastate shipments thereto, as alleged in appellant's second amended bill, and not controverted by answer or otherwise; and in not holding that said order is illegal and void, because in its operation and enforcement it would substantially, directly and necessarily burden and regulate interstate commerce, hamper and prevent the enforcement of the Act to regulate commerce, and compel appellant to abandon or surrender the rights which it has under the Constitution of laws of the United States, and place appellant in such a position it cannot enjoy or exercise its said rights and powers in the transportation of interstate traffic and at the same time obey the provisions of said order, all in violation of the commerce clause of the Federal Constitution, the facts showing which are specifically averred in appellant's bill as amended, and not denied or controverted by answer or otherwise, but admitted by appellees' general demurrer; and in not granting appellant's application and motion for an interlocutory injunction against the enforcement of said order on that ground.

XVI.

In not holding that said order of August 10, 1910, herein complained of, in its direct and necessary operation and effect upon the rates of appellant as a common carrier by railroad of interstate commerce violates Section 2 of the Act to regulate commerce which prohibits unjust discriminations, and in not, on that ground, granting appellant's application and motion for an interlocutory injunction enjoining its enforcement.

XVII.

In not holding that said rate-making order of the Railroad Commission in its direct and necessary operation and effect upon the rates of appellant as an interstate common carrier by railroad, violates Section 3 of the Act to regulate commerce, which prohibits the making or giving of undue or unreasonable preferences, and the subjection of any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Wherefore, the appellant, Louisville & Nashville Railroad Company, prays that the order of the Circuit Court of the United States for the Eastern District of Kentucky, entered January 12, 1911, denying appellant's application and motion for an interlocutory injunction herein, be reversed, and that said Circuit Court be directed to grant said application and motion for an interlocutory injunction in accordance with the prayer of the original bill as amended, and substantially in the terms of the restraining order of September 7, 1910, issued upon the filing of the original bill.

BRIEF OF ARGUMENT.

I.

JURISDICTION OF THE COURT BELOW.

The constitutionality of the McChord Act has been involved in two prior suits, which came to this court for final adjudication. (*McChord* v. *Louisville & Nashville Railroad Company,* 183 U. S. 483; *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175.)

In the first case the constitutionality of said Act though raised, was not passed on by this court, the decree of the court below, the Circuit Court of the United States for the District of Kentucky, (*Louisville & Nashville Railroad Co.* v. *McChord,* 103 Fed. 216), being reversed with a direction that it be dismissed, on the ground that the suit for an injunction had been prematurely brought, no order prescribing railroad rates having been made by the Commission.

In the second case this court again refrained from passing upon the constitutionality of the said Act, although the question was raised, and affirmed the decree of the court below (Judge Cochran, following the decision of Judge Evans in 103 Fed. 216, having held said act unconstitutional and void), upon the ground that the order complained of, which prescribed schedules of maximum rates on all commodities for observance by the appellee (the appellant herein) between all points on all its lines in Kentucky, was beyond the power of the Commission conferred by said Act, properly construed, even if it were valid. In adopting this method of disposing of that case this court said (Ib. 193):

> Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the State statute and the authority therein given to the Commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

In the opinion by Mr. Justice Peckham in the case last referred to, after reciting the several Federal questions raised by the bill (which were substantially the same as the Federal questions made by the bill as amended in the present case), this court upheld the jurisdiction of the court below as follows:

> The Federal questions, as to the invalidity of the State statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or State questions only.
>
> This court has the same right and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. (*Horner* v. *United States* (No. 2), 143 U. S. 570, 576; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 154; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 694; *Burton* v. *United States*, 196 U. S. 283, 295; *Williamson* v. *United States*, 207 U. S. 425; *People's Savings Bank* v. *Layman*, 134 Fed. Rep. 635; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223.) Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. (*Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223 *supra*.)

> The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court.

On the question of jurisdiction the court below in the present case said (186 Fed. 179-80):

> In view of the character of some of the Federal questions presented by the averments of the bill as amended and of the good faith in which the questions are urged, it is scarcely necessary to say that jurisdiction of the cause is vested in this court through the presence of those questions, no matter how it shall be found necessary to decide them, or whether to decide them at all. *Siler* v. *Louisville & N. R. R. Co.*, 213 U. S. 175, 190, 29 Sup. Ct. 451, 53 L. Ed. 753. The nature of the Federal questions made is for the most part like those relied on in that case, and they will be stated as we progress.

It thus appears that the question made in the demurrers of the appellees as to the jurisdiction of the court below herein is effectually foreclosed in appellant's favor.

II.

THE DEMURRERS TO THE BILL.

The demurrer to the whole bill as amended presents five grounds, to-wit: (1) that complainant is, by its own showing, not entitled to the relief prayed; (2) the bill is without equity; (3) the complainant has an adequate remedy at law; (4) the bill is multifarious; and (5) the court has no jurisdiction to hear and determine the matters set up in the bill. (Tr. 71-73; 83.)

The fifth ground, raising the question of jurisdiction, has already been discussed. Of course, on a general demurrer all the *facts* well pleaded in the bill, as amended, are admitted to be true.

As to the first ground, the facts set out in the bill being admitted, if the McChord Act and the Commission's orders thereunder violate either or any of the provisions of the Federal or State Constitutions, as alleged, the relief prayed is entirely appropriate and appellant is clearly entitled thereto.

That relief is, in substance, that on final hearing the said Act be declared and adjudged by decree of this court to be in violation of the Constitution of the United States, and the Constitution of the State of Kentucky, and, therefore, void, and that appellees, individually and jointly as constituting the Railroad Commission of Kentucky, be perpetually enjoined from recommending or causing to be instituted any prosecution by indictment or otherwise against appellant, or any of its officers, agents, or employes, to recover any fine or penalty imposed by said Act for or on account of appellant's failure or refusal to put into force or effect, on any of

its lines of railroad in said State, said Commission's orders, promulgated August 31, 1910, herein complained of, or the rates prescribed thereby.

That the bill is *not* without equity is abundantly shown by the allegations thereof, among others, contained in Paragraphs XIV, XV and XVI, wherein a multiplicity of prosecutions and legal proceedings is shown to be imminent, and appellant, to avoid them, has no adequate remedy at law. The second ground of demurrer is, therefore, not maintainable.

The third ground "that complainant has an adequate remedy at law" will be discussed further on, when we come to the question of what constitutes in a case of this character "*due* process of law."

The fourth ground, which asserts the bill is multifarious, is likewise without foundation. The two orders of the Commission herein complained of were made at the same time, in the same proceeding, between the same parties, and are based upon the same controversy. One order covering the entire ruling of the Commission could have been made, and splitting the finding or conclusion into two orders was unnecessary. If the McChord Act, under which the Commission claimed power and authority to make these orders, is unconstitutional and void, this suit to enjoin the enforcement of the orders as made sets up but one cause of action.

In *Street's Federal Equity Practice*, Vol. 1, Sec. 404, the author states:

> The objection of multifariousness is not looked upon with much favor, and it is one that addresses itself to the discretion of the court. A suit will not be thrown out for this fault except in a clear case. Though a bill is multifarious, in the sense of embracing more than one subject, it will yet be sustained if such procedure is necessary or highly conducive to the administration of justice. The rule against

multifariousness looks to the prevention of needless expense, complexity of the proceedings, and unnecessary prolixity of the pleadings, all of which manifestly tend to delay and annoyance. As has been truly said, the objection of multifariousness is often taken but seldom sustained. When certain very rudimentary conceptions of propriety are fulfilled, the sphere in which a bill becomes objectionable for multifariousness is a rather circumscribed one. It is only when the defect becomes so pronounced as to constitute an obstacle to the proper administration of justice that the courts are inclined to entertain it.

Again, in Section 405, it is stated:

> A bill is not necessarily rendered multifarious by reason of the fact that there may be united in it several causes of action. If all the different causes of action united in the bill grow out of the same transaction, and if all of the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be maintained.
>
> No bill is multifarious that presents a common point of litigation, the decision of which will affect the whole subject matter, and will settle the rights of all the parties to the suit; and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others.

In *Brown* v. *Guaranty Trust & Safety Deposit Co.*, 128 U. S. 412, this court said:

> It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with others. (Citing authorities.)
>
> To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill (Citing authorities.)

The demurrer to that part of the bill which seeks to enjoin and declare void the order awarding reparation to the distillery corporations, which instituted the proceeding before the Commission, will be considered later on, when we come to deal with the provisions of Section 829, Kentucky Statutes, relied on by appellees to sustain that order. It is sufficient to state here that said section has no application to the proceeding before the Commission on the complaint of said distillery corporations, *under the McChord Act*, and, if it were applicable thereto, it is invalid because of certain restrictions and limitations contained therein which will be hereinafter discussed.

While the court below refrained from passing on the demurrers to the original and first amended bills we insist they presented no obstacle to the granting of appellant's motion for an interlocutory injunction.

III

THE McCHORD ACT VIOLATES SECTIONS 27, 28, 109 AND 135 OF THE STATE CONSTITUTION BY UNDERTAKING TO CONFER UPON THE RAILROAD COMMISSION JUDICIAL POWERS.

Error assigned as VIII will be discussed under this heading.

Section 1 of the McChord Act expressly provides that:

"It shall be the duty of the Commission *to hear and determine* the matter (of alleged extortionate rates) as speedily as possible;" that the Commission "shall *hear* such statements, arguments or *evidence*, offered by the parties, *as the Commission may deem relevant;* and should the Commission *determine* that the company or corporation is, or has been, *guilty of extortion*, said Commission shall make and fix a just and reasonable rate," etc. Furthermore, said Act provides that the order entered on the record book of said Commission, fixing a rate, "*shall be in full force and effect* at the expiration of ten days thereafter," etc.

In the language of Judge Evans in *Louisville & Nashville Railroad Co.* v. *McChord, et al.*, 103 Fed. 222:

> These matters all bear the marks of a judicial proceeding, and the fixing of a lower rate has all the appearance of inflicting that much punishment upon the party found "guilty of extortion" by this non-judicial body.

Again Judge Evans states (Ib. 223-4).

> The investigation of a complaint and the decision thereon by the Commission that the railroad complained of is 'guilty of extortion," being the only

> way to put the Act in motion, the railroad is entitled to first have a *judicial* determination of the question of its guilt, *before* the rate can be lowered as a penalty for the act charged to have been committed. The Commission can not *judicially*, nor by due process of law, determine the one question upon which its right to fix a lower rate must depend. * * * Nothing short of a *judicial* proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the Act to have inflicted. The legislature may delegate to a Commission power to establish rates generally, but not the power to try an individual railroad for an *offense*, and lower its rates, alone, as the penalty of such *conviction*.

Further on he states (Ib. 226):

> The court is of the opinion that the Act violates the Constitution of the State, in attempting to confer upon the Commission what are *judicial* powers and functions, to-wit: the power, after complaint and notice given, to "hear and determine" that the railroad has been "guilty of extortion," and, as a consequence, after that finding, to further decide that the freight rate of that road for similar services shall be a lower figure. These steps, as they apply only to individual instances, and are not a method of fixing rates generally, constitute the very essence of a *judicial* proceeding and judgment.

It will be observed that this Act does not provide, as is usual in such Acts defining the powers of Railroad Commissions, that the rates prescribed by the Commission in lieu of those found to be extortionate, shall be regarded *prima facie* as just and reasonable, or that the order of the Commission shall be presumed to be *prima facie* correct. Such a provision in said Act would have plainly indicated that it was the intention of the Legis-

lature that the rates prescribed were not to be regarded as final and conclusive, and were subject to *judicial review*, but instead of such usual provision, this Act declares that after ten days the order condemning the existing rate as extortionate and prescribing a new rate for like services thereafter rendered, "*shall be in full force and effect.*"

This language in said Act is the equivalent of a declaration that the order of the Commission adjudging the carrier's existing rate to be extortionate, and fixing another in its place, *shall be final and conclusive*. Such a provision in the Constitution of California was held to be unconstitutional and void by then Circuit Judge, now Mr. Justice McKenna of this court, in *Southern Pacific Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. 236.

So, an Act of the Kansas Legislature, conferring upon a body called the Court of Visitation power to prescribe maximum rates, and to determine whether or not those rates were reasonable, was held to be in violation of the Constitution of Kansas to the extent that it conferred *judicial* powers upon the same body upon which it conferred legislative and executive powers. (*Western Union Telegraph Co.* v. *Myatt*, 98 Fed. 335.)

A like provision in the Texas Statute, making the establishing of rates by the Railroad Commission *conclusive* evidence of the reasonableness of those rates, was virtually held to be invalid in *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362.

In *Smyth* v. *Ames*, 169 U. S. 466, one of the many points decided was that, while rates for the transportation of persons and property within the limits of the State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitu-

tion secures, and, therefore, without due process of law, can not be so *conclusively determined* by the Legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of *judicial review*.

The contrary was held in *State* v. *Chicago, etc., Railway Co.*, 38 Minn. 281, upon granting an application by the Railroad and Warehouse Commission for a writ of mandamus to compel the C. M. & St. P. R'y Co. to comply with the recommendation made to it by the Commission to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, but that ruling was reversed and the statute of Minnesota, so construed, was held to be unconstitutional and void by this Court in *Chicago, M. & St. P. R'y Co.* v. *Minnesota*, 134 U. S. 418.

In *Roberts* v. *Hackney*, 109 Ky. 265, the court said (Ib. 268):

> But by Section 109 of the Constitution now in force, the *judicial* power of the Commonwealth is vested in the *courts* established thereby. These are the court of appeals, circuit courts, quarterly courts, county courts, justices' courts, police courts and fiscal courts. * * * Under this imperative provision of the Constitution, *no judicial power* can be exercised by any other officer except those named, unless authorized by some other provision of that instrument.

In that case the chairman of the board of trustees of a town of the sixth class, who assumed to discharge judicial powers under certain sections of the Criminal Code, was held to have done so without legal authority.

In *Pratt* v. *Breckinridge*, 114 Ky. 1, it was held, under Sections 27, 28, 109 and 135 of the Constitution, the Legislature has no power to create a board to try election contests, as such a board would exercise judicial powers, and be, therefore, a court.

Section 28 of the State Constitution provides that:

> No person or collection of persons, being of one of those departments (legislative, executive or judicial) shall exercise any power properly belonging to either of the others, except in the instances hereinafter *expressly directed or permitted.*

This language in Section 28 unquestionably prohibits the Railroad Commission, an executive or administrative body provided for in Section 209 of the State Constitution quoted in appellant's original bill, from exercising any judicial power, because the latter section does not *expressly* direct or permit such power to be exercised by that body, although it provides:

> The powers and duties of the Railroad Commissioners shall be regulated by law.

In regulating the Commission's powers and duties by *law*, the Legislature must necessarily conform its legislation for that purpose to the prohibitions in Section 28, as well as in Sections 27, 109, and 135, of the State Constitution.

So, it becomes a question of construction of the McChord Act, and for appellant it is insisted that the construction placed thereon by Judge Evans in the case above referred to is correct; and as stated by Chief Justice Fuller in *McChord* v. *Louisville & Nashville Railroad Co.*, 183 U. S. 495:

> The objection that before this is done (entering orders fixing rates) the Commission is required to exercise *judicial* functions in determining that the companies have charged or received more than a just and reasonable rate, goes to the *validity* of the Act.

It will be observed that the McChord Act consists of only two branches. The first declares the contingency in which the Commission may act *judicially* and take from the railroad company, and thereafter assume for itself,

the rate-making power. The second provides a single method of enforcing the rates made by the Commission in its *legislative* capacity in those cases where it has taken the rate-making power from the railroad company, which method of enforcement is *by indictment of a grand jury in a criminal prosecution* to inflict the heavy fines and penalties prescribed by the Act, both upon the company and upon its officers, agents, or employes, varying from $500 to $5,000 for each offense.

No better definition can be found of what constitutes a judicial act, and of what constitutes a legislative act, with respect to the rates of a public service corporation, than that laid down by Mr. Justice Brewer in *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific R'y Co.*, 167 U. S. 499, as follows:

> It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a *judicial* act; but an entirely different thing to prescribe rates which shall be charged in the future —that is a *legislative* act.

We now call this Court's attention to the views of the court below in passing on the question whether the McChord Act confers *judicial* power on the Commission in violation of the State Constitution. (Tr. 90-96; 186 Fed. 183-189). That court appears to have reached the conclusion that said Act does not attempt to vest such power in the Commission, but that its power over and concerning railroad rates is only legislative in character. In the course of its discussion of this objection to said Act, the case of *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132-140, is referred to. In that case the Court of Appeals held that Sections 816 and 819, Kentucky Statutes, which penalized a railroad company for exacting "more than a just and reasonable rate of toll and compensation for the transportation of passengers

and freight," were *unconstitutional* so far as their provisions were penal, because of their indefiniteness and uncertainty, saying:

> No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury.

It was said by the court below that said decision led to the enactment of the McChord Act, vesting in the Commission the power to ascertain when a railroad carrier is "guilty of extortion," and, if such carrier is found guilty, with the further power to fix a rate in lieu of the one found to be extortionate. Both of these powers, it is said, are legislative.

In this connection the court below cites the case of *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, and states that it should be noted that Mr. Justice Peckham did not in that case observe any vice in the use of the word "extortion." In the passage quoted from that opinion this Court was dealing with the construction of the Act and the scope of the powers granted thereby, after passing the question of its constitutionality, and reached the conclusion the Commission had no power thereunder to prescribe for the observance of a carrier a schedule of maximum freight rates on all classes and commodities, between all points on all its lines in the State, as the Commission had attempted to do in that case.

Again, the case of *Prentis* v. *Atlantic Coast Line Railroad Co.*, 211 U. S. 210, 226, is cited by the lower court as holding the inquiry and decision of the State Corporation Commission of Virginia, concerning the reasonableness or

unreasonableness of existing rates, preceding the fixing by it of a schedule of maximum rates for a railroad carrier, are merely preliminary to its legislative act in prescribing new rates. But that Commission, unlike the Kentucky Commission, was by the Constitution of Virginia expressly vested with legislative, judicial, and executive powers, and with the general and plenary power to prescribe schedules of maximum rates for all railroad carriers in that State, but even then was not expressly required to find such a carrier guilty of extortion, as a condition precedent to the exercise of its right to supplant an existing rate by a new one. The rates sought to be enjoined in the Virginia case were alleged to be confiscatory, and the Commission pleaded the proceedings before it were those in a court of the State, which the Federal Courts, by Section 720, U. S. Revised Statutes, had no power to enjoin. If the Kentucky Commission could be vested with judicial powers under the Constitution of that State, the *Prentis case* would be applicable; but, so long as the rule laid down by Mr. Justice Brewer for this Court in *Interstate Commerce Commission* v. *C. N. O. & T. P. R'y Co., supra*, stands as correct, we shall insist judicial power has been unlawfully conferred on the Kentucky Commission by the McChord Act, for in that case it is distinctly stated "to inquire whether rates which have been charged and collected are reasonable (or extortionate, as provided in said Act) is a *judicial* act."

But the court below also refers to the case of *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 106 Ky. 633, decided prior to the passage of the McChord Act, as showing the power there exercised by the Commission and upheld as lawful by the Court of Appeals was of a judicial nature. There the *specific power* was granted to the Commission by Section 218 of the State Constitution, in special cases, to relieve railroad carriers from the operation of the long and short haul provision contained in that section,

which forbids (as did Section 4 of the Act to regulate commerce at that time) a railroad company to charge a greater compensation for transporting passengers or property, *under substantially similar circumstances and conditions,* for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; provided, however, that, in special cases, upon application to the Railroad Commission, the carrier might, after investigation by said Commission, be authorized to charge less for a longer than a shorter distance, and that the Commission might, from time to time, prescribe the extent to which such carrier may be relieved from the operation of said section. It appeared in that case the Louisville & Nashville, in the transportation of coal, charged less for a longer than for a shorter distance, justifying such charge on the ground that it was necessitated by competition at the longer distance point, and insisted, therefore, the charge at the shorter distance point was not "under substantially similar circumstances and conditions." But after investigation, the Commission declined to relieve the Company from the operation of said section or the statute made in pursuance thereof, and the Company, thereafter insisting upon what it conceived to be its lawful right, was subsequently indicted and fined, at the instance of the Commission.

The Court of Appeals affirmed the judgment of the Circuit Court, using the language quoted in the opinion of the court below in the present case (186 Fed. 188), and that decision was affirmed by this Court. (183 U. S. 503, 515). We fail, however, to see the application of that case to the one under consideration. The question of the reasonableness of existing rates for the shorter haul or of those for the longer haul was not involved, and at that time no attempt had been made by the Legislature to give the Commission the rate-making power. The question was simply

one of *fact* whether the circumstance of competition at the longer distance point entitled the carrier to charge *less* on coal to that point than to an intermediate point.

The Commission held competition was not sufficient to make substantially a dissimilar condition, and the courts upheld its authority to decide the question, on the ground that the Constitution by Section 218 had created it "a special tribunal for this purpose."

It matters not whether the authority thus conferred be legislative, judicial, or executive, it was granted to the Commission by said Section 218 of the Constitution itself specifically, which is after Section 28 thereof, hereinabove quoted, which declares:

> No person, or collection of persons, being of one of those departments (legislative, executive or judicial) shall exercise any power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*

It is insisted, however, that Section 218 of the Kentucky Constitution does not delegate *judicial* powers to the Commission. That section positively prohibits a railroad company from charging or receiving a greater compensation for the transportation of passengers or of property of like kind, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, with a proviso, empowering the Commission to ascertain the existence of a *particular fact*, that is to say, where any railroad company departs from this rule on the ground that the circumstances and conditions are substantially dissimilar, the Commission, on application, after investigation, ascertains the *fact*, and refuses or grants relief accordingly, and its action in the case cited was construed to be final. This power is neither legislative nor judicial, but purely executive or administra-

tive. This Court has so announced repeatedly in similar cases.

In *Field* v. *Clark*, 143 U. S. 649, the constitutionality of the McKinley Tariff Act of 1890 was attacked on the ground that Congress had attempted to delegate legislative power to the President, by providing in effect that, when he ascertained any other country which produced and exported to the United States certain commodities was imposing unequal or unreasonable duties or other exactions upon the products of the United States, it should be his duty to suspend, by proclamation, the provision of said Tariff Act relating to the future introduction of such articles from such country. In disposing of that contention this Court said (Ib. 693):

> As the suspension was absolutely required when the president ascertained the existence of a *particular fact*, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to *ascertain and declare the event* upon which its expressed will was to take effect.

The same doctrine was announced by this Court in *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, where in the latter case this Court said (Ib. 386):

> By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule pre-

> scribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not* be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions.

The court below also cites on this branch of the case *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 120 Ky. 91, where the suit was brought by the Commonwealth to compel the company to furnish a passenger train on its branch line between Shelbyville and Christiansburg, Kentucky. Section 772a, Kentucky Statutes, requires railroad companies to run at least one passenger train on its lines each way on every day, except Sunday. The Commission had ordered such passenger service to be put in, but the company refused to do so on the ground that compliance therewith would entail upon it a heavy and continuous loss. The court, however, enforced the recommendation of the Commission, holding the Statutes requiring such service to be reasonable.

The decision there has no bearing on the case at bar. The question there presented and decided was really whether the company owed a duty to the public to perform a function contemplated and imposed by its charter and also specified in the general laws of the State, viz: To run a passenger train daily each way over a branch line d[illegible]ich the company had constructed for the use of a lessee app[illegible]pany for a limited through service.

refus[illegible]d section of the Statutes prescribes the quality case ci[illegible]e required of a railroad company, and declares legislativ[illegible]lation of the provisions thereof shall subject the

company to a forfeiture of its charter and to a fine upon conviction thereof.

As the present case involves the validity of orders relating to rate-making, it differs essentially from the case above named. This essential difference was pointed out by this Court in *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission*, 206 U. S. 1, wherein an order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld despite the fact that it was conceded that the return from the operation of such a train would not be remunerative. On page 26, this Court said:

> This is (the distinction), because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of *unreasonableness*, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth* v. *Ames*.

And the above language was quoted with approval in the later case of *Missouri Pacific Railway Company* v. *Kansas*, 216 U. S. 262-278. The syllabus in the latter case, which involved an order of the State Commission requiring a train to be run from a point within the State to the State line, contains the following statement:

> There is a difference between the exertion of the legislative power to establish rates in such manner as to confiscate the property of a public service corporation by fixing them below a remunerative standard and one compelling the corporation to render a service which is essentially its duty to perform; and an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due

process of law, or a taking of private property for public use without compensation; nor is such an order an *unreasonable* exercise of governmental control.

Accordingly, the fact that the Kentucky Court of Appeals decided that the railroad company could be compelled, in a suit brought by the State, to render a service which was essentially its duty to perform, under its charter or the general laws of the State, cannot be used to sustain the contention of the appellees that the Commonwealth has a right to institute an action for a mandamus or a mandatory injunction to force a carrier to obey an order of the Commission, fixing *rates* for the transportation of freight. There is no provision in any of the statutes of Kentucky, authorizing the enforcement of an order of the Commission concerning rates, by mandamus, or by mandatory injunction, or by other process in the courts, in the name of the State or of the Commission, nor has the Court of Appeals in any decision ever held that an order of the Commission reducing or prescribing rates for a railroad carrier may be thus enforced.

In *Pennington* v. *Woolfolk*, 79 Ky. 13, to which the court below refers (Tr. 96) by way of showing the Court of Appeals has held a power *not judicial* might be lawfully conferred upon a county court, the controversy related to the revenue of the State. The Act in question empowered that Court "to assess and fix the value" on property omitted from assessment by the assessor. The decision was under the Constitution of 1850, which was like previous Constitutions and the present Constitution, concerning the distribution of powers. The court stated that statutes conferring similar powers on the county court had been acquiesced in as valid for more than three-quarters of a century by the bar and all departments of the government, thus receiving a practical construction which would not be overturned. But the court in that

case appears to have overlooked Section 33, Article IV in the Constitution of 1850, which provided:

> The jurisdiction of the county court shall be regulated by law, and, until changed, *shall be the same now vested in the county courts of this State.*

That section seems to have been controlling of the question involved in that case, because powers and jurisdiction relating to the revenue of the State and tax matters had been conferred on the county court ever since the Constitution of 1792. This section came within the exception to Section 2, Article 1, of that Constitution, forbidding the exercise by any person, being of one department, of any power properly belonging to either of the others, as follows: "except in the instances hereinafter expressly directed or permitted."

Section 1, Article IV, of the Constitution of 1850, concerning the judicial department, contained a provision allowing the General Assembly, from time to time, to erect and establish courts *other* than those therein named, inferior to the Court of Appeals, while Section 135 of the present Constitution for the first time effectually prevents the establishment of any more courts than those named in Section 109 thereof, in which the whole judicial power of the Commonwealth is vested, by declaring:

> No courts, save those provided for in this Constitution, shall be established.

Since the adoption of the present Constitution, this prohibition has been strictly adhered to and enforced by the Kentucky Court of Appeals, as will be seen from the authorities already cited. (*Roberts* v. *Hackney*, 109 Ky. 265; *Pratt* v. *Breckenridge*, 114 Ky. 1.)

IV.

THE McCHORD ACT AS ADMINISTERED BY THE COMMISSION OPERATES TO DEPRIVE THE CARRIER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND TO DENY TO THE CARRIER THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF SECTION 1 OF THE FOURTEENTH AMENDMENT.

The application of errors assigned as I, II, and IV, will be discussed under this heading.

Neither the said Act nor any other statute of the State of Kentucky provides for an appeal to any court from a final order of the Commission adjudging the carrier's existing rate extortionate and taking away from it the rate-making power over the subject-matter of the complaint, nor for any judicial investigation or review of the question of the reasonableness of the rate fixed by the Commission. The carrier is compelled, therefore, either to put in such rate, although insufficient to afford a fair and just return upon the value of its investment devoted to intrastate traffic, and to suffer the consequent loss (notwithstanding it may be unjustly discriminatory), or to disobey the Commission's order and risk numerous prosecutions and the infliction of enormous fines and penalties.

If the carrier's property is not to be taken without due process of law or for public use without just compensation, and yet its use is to be regulated and the prices obtained for the services its owner renders are to be controlled by order of the Commission or statute, there must be full opportunity for judicial examination of every such statute or order for the purpose of determining whether

it goes further than the limits fixed by the fundamental law which controls even the statute-making and order-making bodies. Thus it was said by this court in *Chicago, Milwaukee & St. Paul R. Co.* v. *Minnesota*, 134 U. S. 458:

> The question of the *reasonableness* of a rate or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for *judicial* investigation, requiring due process of law for its determination. If the company is deprived of the power of charging *reasonable rates* for the use of its property, and such deprivation takes place in the absence of an investigation by *judicial* machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States.

In Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 399, Mr. Justice Brewer said:

> In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public. This, as has often been observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held.

In *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. 224-5, Judge Evans stated:

Of the hearing upon the charge before the non-judicial administrative body, a species of notice and an opportunity to be heard as to the reasonableness and justness of the rates is given. But all that is thus done is preliminary to having a justification for the further step, if the railroad charges an excess rate over that thus fixed, of having it convicted of another and further extortion, without any provision in the act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just. No opportunity for such an investigation is afforded by the statute when the courts are given jurisdiction of the cases, and it is by no means certain that those courts would feel constrained to give the relief in the absence of an express statutory requirement. These considerations, therefore, seem to bring this case within the principle first above quoted from the opinion of the Supreme Court in the Minnesota case. If it had been the intention of the Legislature to recognize the right to a judicial investigation of the reasonableness of the rates fixed under the provisions of the Act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms, in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case, without a Commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the Commission had acted, and to enforce by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the Supreme Court, this purpose thus plainly written in the legislation must be fatal to its validity.

There has been no change in the status of State legislation with respect to the powers and duties of the Com-

mission since this decision of Judge Evans. It remains just as it was then, and the sound reasoning he employed in that decision, after full argument by able counsel representing the parties at that time, has in the meantime lost none of its logic or convincing power. It is a precedent in a case involving the validity of the McChord Act set in the Circuit Court of the United States for the District of Kentucky, prior to the division of that State into the Western and Eastern Districts, which, it seems to us, should have been followed by the court below. There has been no decision either of the Court of Appeals of Kentucky or of this court since Judge Evans delivered his said opinion, which authorizes the conclusion, as asserted by the learned counsel for appellees in their oral argument of this case in the court below, that he would not now adhere thereto, if the objections to said Act were again presented to him.

In *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 172, this court said:

> Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State Legislature for the carriage of passengers and freight are *unreasonable*. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men, and by this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it *by*

the arbitrary enactment of any Legislature, State or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. (Citing authorities.)

It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the Legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the Legislature proceeds further, and declares that *only a certain price* shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken *without due compensation;* and the *legislative* determination of value does not preclude an investigation in the *proper judicial* tribunals. *The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.*

If the question of the reasonableness of the rates of a railroad company can not be so conclusively determined by the Legislature, or by a Commission under its authority as to preclude judicial inquiry, and if a railroad has the right of appeal to the courts for the final determination of that question, and the right to invoke such judicial inquiry and protection is guaranteed by the Federal Constitution, then clearly, if an act be so framed as to destroy or evade such judicial supervision, it must be held

void if the guarantees of that Constitution are to be enforced. The McChord Act is of that description. From its language, if the railroad carrier does not put into force the reduced rate as ordered by the Commission, indictments upon the recommendation of that body may be found against it in numerous counties of the State, as well as against any officer, agent, or employe who fails to do so, or charges, collects, or receives a higher rate.

The only pleas allowable under the Criminal Code of Kentucky to an indictment are as follows (Sec. 172):

1. A plea of guilty.
2. Not guilty.
3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty.

A defense or proof to the effect that the existing rate of the carrier is reasonable, or that the rate fixed, in lieu of it, by the Commission is unjust or unreasonable, would not be permitted by the criminal court under the plea of "not guilty" to an indictment against the carrier or any of its officers, agents, or employes. Besides, if such a defense, or proof to sustain it, were allowed to be presented for the consideration of the jury in a criminal court, under the McChord Act, the question of reasonableness of the rate charged, collected or received by the carrier or officer, agent or employe indicted, after a verdict and judgment of *acquittal*, could not be pleaded as as *res judicata* on the trial of another indictment in the same or another criminal court against the same carrier, officer, agent, or employe for charging, collecting, or receiving a higher rate than that fixed by the Commission on another shipment in the same schedule of maximum rates. Nor could a verdict and judgment of *conviction* in one criminal case be pleaded as *res judicata* by the Com-

monwealth on the question of the reasonableness of the rates fixed by the Commission.

Such a remedy, even if allowed by the Act in question, does not afford the "*due* process of law" to which the carrier is entitled before its property or the use thereof can be taken by the State or the Commission acting for and in its behalf. A criminal court has no equity jurisdiction. It can not grant a preliminary or permanent injunction against the enforcement of unjust or unreasonable rates. Its powers and jurisdiction extend only over the carrier or person indicted. It has no power to appoint a special Master or Commissioner to take evidence and to report thereon. The trials in such a court are before a jury. The machinery of a court of criminal jurisdiction is wholly unadapted to the trial and determination in any authoritative or conclusive manner, of the question of the reasonableness or unreasonableness of a schedule of maximum freight rates prescribed for observance by a railroad carrier.

It is clear, and it must be conceded by appellee's learned counsel, that upon the trial of an indictment the determination of the reasonableness of the Commission's rate, if that question can be then inquired into, is wholly for the jury. Section 353 of the Criminal Code of Practice of Kentucky, dealing with the subject of appeals in misdemeanor cases, is as follows:

> The judgment shall be reversed for any error of *law* appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

It is settled by the decisions of the Court of Appeals of Kentucky that if there be *any* evidence to sustain a judgment of *conviction*, such judgment will not be reversed on the ground that it is *against the evidence*. (*Pat-*

terson v. *Commonwealth*, 86 Ky. 313; *Franklin* v. *Commonwealth*, 92 Ky. 612.)

The hopelessness of submitting a question of this character to a jury and of permitting it to go at large into an investigation of the history and financial condition of a railroad company, the nature and extent of its revenues and expenses, and the propriety of all the elements of each, is such that the question has never to our knowledge been actually submitted to a jury, even in a civil case, although it is a common law principle that there may be recovered from a carrier any excess charged by him over a just and reasonable rate.

In *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 460, Mr. Justice Miller, concurring, said:

> The proper, if not the *only*, mode of judicial relief against the tariff of rates established by the Legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of a just compensation for the service rendered.

In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 394, Mr. Justice Brewer distinctly recognizes that the court applied to must have and should exercise the power to issue a preliminary injunction, in a proper case, for the carrier's protection during the pendency of the suit to settle and determine the reasonableness of a body of rates prescribed for a railroad company, as follows:

> The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess

> of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property, that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the Commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the Commission.

This argument, in behalf of the Texas Commission, however, was rejected by this court in that case as unsound.

In *Smyth* v. *Ames*, 169 U. S. 518, Mr. Justice Harlan said:

> The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. *Only* a court of equity is competent to meet such an emergency and determine, *once for all* and without a multiplicity of suits, matters that affect not simply individuals, but the interest of the entire community.

This Court in *Detroit* v. *Detroit Citizens Street R. Co.* 184 U. S. 381, repeated with approval the language of Mr. Justice Harlan last quoted, and said:

> *Only* a court of equity is competent to meet such an emergency.

Nothing can be more erroneous than to say that regardless of the appropriateness of the tribunal, all that *due process* demands is "reasonable notice and a fair opportunity to be heard."

A very different definition of due process is that given by Judge Cooley:

> Due process of law *in each particular case* means such an exertion of the powers of government as the

> settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the *class of cases to which the one being dealt with belongs.* (*Cooley's Const. Lim.* (7th Edition), 506.)

The same author states that what may be sufficient due process in one case may not be sufficient in another. (Ib. 502.)

Mr. Justice Field in *Hagar* v. *Reclamation District*, 111 U. S. 708, in defining due process of law, states:

> It is sufficient to observe here that by "due process" is meant one which, following the forms of law, *is appropriate to the case and just to the parties to be affected.* It must be pursued in the ordinary mode prescribed by the law; *it must be adapted to the end to be attained;* and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.

Mr. Justice Bradley, in a concurring opinion in the case of *Davidson* v. *New Orleans*, 96 U. S. 107, said:

> I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is *some* process of law, but "*due* process of law," provided by the State law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the *cause* and *object* of the taking, whether under the taking power of eminent domain, or the power of assessment for local improvements, or none of these; *and if found to be suitable or admissible in the special case*, it will be adjudged to be "due process of law"; but if found to be *arbitrary, oppressive and unjust*, it may be declared to be not "due process of law."

The very familiar definition of "due process of law," which Mr. Webster formulated and which has been approvingly recognized by this Court (*Hurcy* v. *Elliott*, 167 U. S. 418), declares in part:

> The meaning is that every citizen shall hold his life, liberty, property and immunities *under the protection of the general rules which govern society.*

In *Violett* v. *Alexandria,* 92 Va. 561, 569, the Virginia Court of Appeals quoted with approval the following language from the opinion of the Court of Appeals of New York:

> It may, however, be stated generally that due process of law requires an orderly proceeding *adapted to the nature of the case,* in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. We can not conceive of due process of law without this.

And again in the same opinion, on page 572, an essential element of due process is declared to be a hearing "before some authority *competent* to afford relief in case of invalidity or injustice." and on page 573 it is recognized that the proceedings must be "appropriate to the nature of the case."'

In the Minnesota case, cited above, the rates fixed by the Railroad Commission were made enforceable by mandamus proceedings (a civil suit) in the Supreme Court of that State. The railroad carrier offered in defense of that kind of a proceeding to show by evidence the rates prescribed for its observance were *unreasonable,* but the court refused to allow such evidence to be introduced, on the ground that under the statute of that State the action of the Commission was final and conclusive on the question of the *reasonableness* of the rates prescribed. On the question of whether such a statute, thus construed, afforded due process of law, this court said (134 U. S. 456):

> This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It de-

prives the company of its right to a *judicial* investigation by due process of law under the forms and *with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy*, and substitutes therefor, *as an absolute finality*, the action of a railroad commission which, in view of the powers conceded to it by the State court, *can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice*.

In the case of *Ex parte Young*, 209 U. S. 123, the court reiterated the principle that the only way by which the large property interests of railroad companies and other public service corporations can be protected from such legislative wreckings is by a bill in equity. In that case Mr. Justice Peckham said (Ib. 163-5):

> It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, *at least once*, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.
>
> Another obstacle to making the test on the part of the company might be to find an agent or employe who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the Passenger Rate Act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of five thousand dollars and imprisonment for five

years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before *a jury*, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. *Chicago, etc., Railway Co.* v. *Tompkins*, 176 U. S. 167. From all these considerations it is plain that this is not a proper suit for investigation by a *jury*. Suits for penalties, or indictment or other criminal proceedings for a violation of the act would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were *too low* and therefore the act invalid.

Again in the same case it was said (Ib. 165):

> To await proceedings against the company in a State Court grounded upon a disobedience of the act, *and then if necessary obtain a review in this court*

*by writ of error to the highest State Court, would place the company in peril of large loss * * * if it should be finally determined that the act was valid.* This risk the company ought not be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people, who are scattered over the whole country from ocean to ocean, and they are entitled to *equal protection* from the laws and from the courts with the owners of all other kinds of property, no more, no less. *The courts having jurisdiction, Federal or State, should at all times be open to them as well as to others for the purpose of protecting their property and their legal rights.*

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, *and enjoining the enforcement of the act until the decision of the court upon the legal question.*

The court further stated (*Ib.* 166):

The question of *sufficiency of rates* is important and controlling, and being of a *judicial* nature it ought to be settled at the earliest moment by some court, and when a Federal Court first obtains jurisdiction it ought on general principles of jurisprudence to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts.

But it is argued by appellees' learned counsel that the McChord Act does not *expressly forbid* the railroad carrier from going into a court of equity, either State or Federal, and obtaining relief by injunction, against the enforcement of arbitrary, unjust, unreasonable, or confiscatory rates prior to the expiration of the interim of ten days before such rates become effective. With respect to appellant's right to seek such relief in a Federal court of equity, it is not at all dependent upon State legislation, nor can that right be in any way abridged or denied by such legislation. It is a right guaranteed by the provisions of the Constitution of the United States. (Sec. 2, Art. III.)

We contend, however, that the Act in question is void, *because it does not provide for any appeal by the carrier to a State court or a judicial review of any kind of the reasonableness of railroad rates fixed by the Commission before they become effective.* It is no answer to this objection to the constitutionality of the Act to say that the appellant has its remedy and actually resorted to it by bringing this suit in this court. The very fact that the Act is unconstitutional on account of its failure to provide for an appeal or a judicial review furnishes one of the main grounds for the relief sought herein. Appellees' reasoning on this subject is fallacious. They argue, in effect, that any Act of a State Legislature which denies or fails to provide for a judicial hearing in behalf of the carrier before its property rights are taken from it is constitutional, because such carrier has its remedy by suit in a Federal court of equity to enjoin its enforcement on the ground that such Act violates the provisions of the Constitution of the United States. In other words, such an Act is *valid*, because the carrier may protect itself from its enforcement by bill in equity for an injunction in a Circuit Court of the United States on the ground that it is *invalid*.

The contention of appellees that the McChord Act is valid, notwithstanding it is silent with respect to a judicial review, is unsound. It is insisted for appellant that the right of the carrier to a judicial hearing before being compelled to put into effect the rates prescribed by the Commission must be expressly provided in the Act or in some other statute of the State, else it is invalid. This essential to validity can not be left to the discretion of a court, which may not grant appropriate or any relief. When the Hepburn Act, approved June 29, 1906, was before Congress, the necessity of incorporating a provision therein granting the carrier a judicial hearing upon any

rate fixed for it by the Commission, and allowing the same to be suspended before the carrier was required to put the same into effect, was discussed by the ablest lawyers in the Senate, and the conclusion was finally reached by a majority of that body that the Act would be unconstitutional without such a provision. So Section 16 of the Act to regulate commerce was amended so as to contain the following provision:

> The venue of suits brought in any of the circuit courts of the United States against the Commission *to enjoin, set aside, annul or suspend any order or requirement of the Commission* shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, *and may be brought at any time after such order is promulgated.* And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; *and jurisdiction to hear and determine such suits is hereby vested in such courts.*

Following out this necessary provision for a judicial review of Commission-made rates for interstate carriers, it is expressly provided in Section 1 of the Mann-Elkins Bill, approved June 18, 1910, as follows:

> That a court of the United States is hereby created, which shall be known as the Commerce Court, and shall have the jurisdiction *now* possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: • • •
>
> Second. *Cases brought to enjoin, set aside, annul or suspend, in whole or part, any order of the Interstate Commerce Commission.*

In the recent decision in the case of *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, decided January 25, 1909, in speaking of Section 213 of

the Constitution of Kentucky, which requires, according to the construction given thereto by the Court of Appeals of that State, one carrier to deliver its own cars loaded with freight to another carrier at a point where there is a physical connection between their tracks, Mr. Justice Holmes for this court said:

> It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless trans-shipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal undiscriminating requirement, with no *adequate provisions* such as we have described. The want cannot be cured by inserting them in judgments under it. *The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.* See *Security Trust & Safety Vault Co.* v. *Lexington*, 203 U. S. 323, 333; *Roller* v. *Holly*, 176 U. S. 398, 409; *Connecticut River R. R. Co.* v. *County Commissioners*, 127 Mass. 50, 53; *Ash* v. *Cummings*, 50 N. H. 591; *Moody* v. *Jacksonville, Tampa & Key West R. R. Co.*, 20 Fla. 597; *Ex parte Martin*, 13 Ark. 198; *St. Louis* v. *Hill*, 116 Mo. 527. It follows that the requirement of the State Constitution *cannot stand alone under the Fourteenth Amendment*, and that the judgment in this respect also, being based upon it, *must fall.*

In *Roller* v. *Holly*, 176 U. S. 409 (one of the cases cited in the opinion of Mr. Justice Holmes last quoted from) this court said:

> The right of a citizen to due process of law must rest upon a basis more substantial than *favor* or *discretion*.

The court below held the McChord Act is not unconstitutional under the due process clause of the Fourteenth Amendment, because it provides for notice to the carrier and a hearing and trial on evidence before the Commission, a non-judicial body, although it makes the latter's order prescribing rates final and conclusive on the carrier, without right of appeal to a court or to a judicial review. (Tr. 98-101; 186 Fed. 191-93.)

To sustain its ruling in this respect two cases are cited, the first being *C. N. O. & T. P. Ry. Co.* v. *Commonwealth*, 81 Ky. 492, affirmed by this court in *Kentucky Railroad Tax Cases*, 115 U. S. 321; and the other being *San Diego Land Co.* v. *National City*, 174 U. S. 739. The first case is a tax case involving the revenue of the State. It is a well established doctrine in this country that in cases of that class due process of law does not necessarily mean judicial process, notice and an opportunity to be heard on the subject of the value of the property assessed before the assessing officer or board provided by law being sufficient.

So, in *Murray's Lessee, et al.* v. *Hoboken Land & Improvement Co.*, 18 How. 272, this court said (Ib. 282):

> It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a *distinction* between such claims and all others, which has sometimes been carried out by summary methods of fines and penalties, but always in some way observed and yielded to.

Again, this court in *Bauman* v. *Ross*, 167 U. S. 548, recognizing the same doctrine, said (Ib. 590):

> If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

(See also *Paulson* v. *Portland*, 149 U. S. 30; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Hibben* v. *Smith*, 191 U. S. 310.)

In the *Kentucky Railroad Tax Cases*, however, it clearly appears, and Mr. Justice Mathews refers to the fact (at page 335), the tax imposed had to be ultimately enforced by judicial proceedings, whereby the railroad companies were afforded all they claimed they were entitled to in the way of a judicial hearing.

The second case cited by the court below to sustain its view that the McChord Act making the order of the Commission fixing rates final and conclusive, without affording the carrier a judicial review, simply because it provides for notice and hearing, is *San Diego Land and Town Co.* v. *National City*, 174 U. S. 739. That suit was brought by the appellant, a Kansas corporation, in the Circuit Court of the United States for the Southern District of California, against the appellee, a municipal corporation of California, to enjoin the enforcement of an ordinance adopted by the appellee fixing the rates for water supplied by appellant to appellee and its inhabitants, for one year.

The Constitution of California provided that the rates to be collected by any corporation in that State for water supplied to any city or town or its inhabitants shall be fixed annually by the board of supervisors, council, or other governing body of such city or town, by ordinance or otherwise, to be passed in February of each year and take effect on July 1 thereafter, and further provided

that such right to furnish water was a franchise which could not be exercised except by authority of and in the manner prescribed by law, and that any corporation collecting water rates in any city or county otherwise than as so established should forfeit its franchise and waterworks to such city or town. The injunction was sought on the ground that appellant had no notice or hearing upon the matter of fixing its water rates; that they were fixed arbitrarily, and were unreasonable, unjust, and confiscatory. The court, however, said that the Constitution itself was notice that such an ordinance would be passed annually in February and would take effect on July 1 thereafter; and it was the right and duty of appellant in January of each year to furnish the appellee with a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by an ordinance. Thus provision was made for a hearing in an appropriate way, it being the duty of appellee to receive, consider, and give proper weight to such statement in determining rates. The court further said the power thus conferred on appellee could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who supplied it with water, "for the State cannot by any of its agencies, legislative, executive, or judicial, withhold from the owners of private property *just compensation for its use.*" (Ib. 754.)

The court then proceeds to say:

> In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that

> a State enactment invades or destroys rights secured by the Constitution of the United States a *judicial* question arises, and the courts, Federal and State, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law.

In that case the whole body of the company's rates for supplying water to the city and its inhabitants was involved, and the question, as the court states, was whether, under the evidence, such rates as fixed by the city amounted

> to a taking of property without *just compensation*, and, therefore, to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. (Ib. 760.)

This court simply held the evidence of appellant in that case was insufficient to sustain the averments of its bill, and was very far from holding the action of the city's board of trustees, in fixing water rates, was final and conclusive, and not subject to judicial review.

V.

APPELLANT IS ENTITLED TO JUST AND REASONABLE COMPENSATION FOR EACH SEPARATE SERVICE, AND IF COMPELLED TO ACCEPT LESS COMPENSATION, WITHOUT A JUDICIAL HEARING, IT IS DEPRIVED OF ITS PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Under this heading we shall discuss the error assigned as III.

So long as a common carrier's existing rates are just and reasonable for the services it performs, it is within its constitutional and statutory rights. If it goes beyond that limitation, and charges, collects, or receives more than a just and reasonable rate or compensation for its transportation services, it is in the wrong. What constitutes a just and reasonable rate for the services a carrier has performed is a question of fact on which the carrier is entitled to a *judicial* hearing. Still more is it entitled to such a hearing, if, as a consequence of a decision by the Commission that it has exceeded the limits of just and reasonable compensation for past services, it must forfeit in favor of such statutory body its *rate-making power* and be deprived of that property right with respect to "like services thereafter rendered," as provided in the McChord Act. To prescribe rates which shall be charged in the future is the exercise of a legislative function. Before the Commission, under the McChord Act, can take a step in the direction of fixing rates for a railroad carrier's future services, it must, after notice and investigation, determine, from the evidence, such carrier's existing rates are extortionate, or, in other words, find

"the company or corporation is or has been guilty of extortion." That determination or finding is the essential *jurisdictional fact*, which must exist before the Commission can take away such carrier's right to initiate and make its own rates, and acquire for itself the power to make rates for "like services thereafter rendered." If the existing rates of the carrier accused of extortion are not in fact unjust, unreasonable or extortionate, then the Commission has no power, authority or jurisdiction, under the terms of the Act, to prescribe reduced rates, in lieu of them, for that particular carrier's services in the future. It is upon the existence or non-existence of that jurisdictional fact that the Commission's power or lack of power, in any given case, depends. Only a court of equity can fairly, finally, and conclusively determine whether or not such jurisdictional fact actually existed when the Commission assumed and exercised the rate-making power. If upon a judicial investigation and the evidence adduced by the parties it turns out such jurisdictional fact did not exist, then all that the Commission did, on its erroneous assumption or finding, in the way of making rates for the carrier's services thereafter performed, is necessarily null and void, without regard to whether the new rates prescribed, under such circumstances and conditions, are reasonable or unreasonable, compensatory or confiscatory. The sole question under the provisions of the Act we are dealing with, in this respect, is one of power. So, we claim that appellant is entitled to a judicial hearing upon the questions of fact, when the case comes to be tried on its merits (a stage which it must be remembered by this court it has not yet reached), viz:

1. Were appellant's existing rates unjust, unreasonable, or extortionate, as found by the Commission?

2. Are the reduced rates prescribed by the Commission arbitrary, unjust, unreasonable, discriminatory, or otherwise illegal, as alleged in the bill?

Sufficient evidence appeared, it seems to us, from the uncontradicted averments of the verified bill as amended and the affidavits filed in support thereof, to have required the court, on the hearing on the motion for an interlocutory injunction, to answer the first of the foregoing questions in the negative and the second in the affirmative.

There was no answer filed in the court below, the demurrers to the bill and first amended bill were not passed on by that court. All the facts well pleaded in the original and two amended bills which were verified (Tr. 26, 82, 120-121), being uncontradicted, should on the motion for a temporary injunction have been treated as true. They were fully supported by the affidavits of Traffic Manager Compton (Tr. 45-48) and General Freight Agent Goodwyn (Tr. 59-65).

Some of the most important *facts*, thus alleged in the bill as amended and proven by these witnesses, to establish the proposition that these two vital questions should be answered as above indicated are called to the court's attention briefly, as follows:

1. The existing rates found to be extortionate by the Commission, August 10, 1910, on the complaint of twenty-three interested distillery corporations, having plants for the manufacture of whiskey at the sixteen stations on appellant's lines in Kentucky, are the usual and standard rates of appellant on corn, rye, barley and malt, and the other commodities named in the Commission's order, which have been in force for a great many years, charged and received at all stations on all its lines in Kentucky, for like distances, for uses and purposes *other* than the manufacture and shipment of whiskey, without any complaint whatever from any of such consignees.

2. The special and unusually low rates on such grain and commodities, when used in the manufacture and shipment of whiskey at the plants of the Greenbrier Distillery Company and others, were voluntarily put in originally by appellant to encourage whiskey manufacture at interior points in Kentucky, when that industry was in its infancy, but when said special rates had become no longer necessary, and the conditions which first prompted appellant to put them in had ceased to exist, and the distillers who had been benefited by them had prospered, and within the past few years many of them had made enormous fortunes, the usual and standard rates charged and received from *all other consignees* of like commodities were restored and applied also to distillers' supplies, on March 25, 1910.

3. The said special rates on distillers' supplies were applied to forty-eight stations in all on appellant's lines where distillery plants are located, a list of which will be found in Mr. Compton's affidavit (Tr. 77-78), the distillers at thirty-two or two-thirds of which had made no complaint to the Commission since appellant withdrew such low rates and put into effect its usual and standard rates on shipments of such supplies to all of said forty-eight stations.

4. To put into force again said special rates to only sixteen or one-third of said stations, as ordered by the Commission, would create an unjust discrimination against the distillers at the other thirty-two stations.

5. The Commission's rates apply only from three points of origin (Louisville, Covington, and Newport) to sixteen points of destination named in the order of August 10, 1910, and *apply only one way*, while shipments of the same kind of commodities *from the sixteen points to the three points mentioned must take appellant's usual or standard rates thereon*, thus establishing an un-

just discrimination against shippers and localities, and an undue and unreasonable preference in favor of others.

6. The complaint of the distillery corporations before the Commission asked only for a restoration of the special rates on such grain and commodities used in the manufacture and shipment of whiskey as existed prior to March 25, 1910, yet the order of the Commission not only grants such special rates, where the shipments are used for the manufacture and shipment of whiskey, but grants *flat rates*, on such commodities without regard to the use to which they are to be put.

Mr. Compton states that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified, a large proportion of which will be devoted to uses *other* than the manufacture and shipment of whiskey, thus making an unjust discrimination against shippers of the same commodities to and from other points in the State, and in favor of the sixteen points named in the Commission's order. (Tr. 52-53.)

7. The establishment of such special rates on said commodities will create, as will be hereinafter commented on, an unjust discrimination against a necessary interference with, and a burden upon, interstate commerce passing through the Cincinnati and Louisville crossings of the Ohio River.

8. The Commission's rates create an undue and unreasonable discrimination in both the intrastate and interstate rates on said commodities against intermediate stations on appellant's lines between the points of origin and destination in Kentucky, set out in the Commission's order, which is illustrated by the table in Mr. Compton's affidavit with respect to the six stations at which distillery plants are located on the Lebanon Branch. (Tr. 56-7.)

9. The rates complained of create a distinction between corn, rye, barley and malt, on the one hand, and wheat, oats and other kinds of grain, on the other hand, prescribing lower rates on the former, and leaving appellant's existing or standard rates in force on the latter from the same points of origin, over the same line, to the same points of destination, shipped in the same quantities, when appellant's usual or standard rates apply to *all* kinds of grain alike.

10. The Commission's rates apply only to *carload lots* of corn, rye, barley and malt, whereas appellant's usual or standard rates apply alike to *less than carload and carload* shipments of *all* kinds of grain, thus creating an unjust discrimination against the shippers of grain in *less than carload* lots, which does not now exist.

11. The rates complained of are substantially *lower* in comparison with the rates charged elsewhere in Southeastern territory by appellant and by other railroad companies, and are materially *lower* than the rates fixed and declared by the same Commission in 1906 (afterward set aside by the decree of the court below, which this court in the case of *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, affirmed because the Commission had no power to prescribe the same), to be just and reasonable for the transportation of such commodities in Kentucky for the same or similar distances upon appellant's lines, as well as upon those of the Illinois Central, the Southern Railway, the N., C. & St. L. Railway, and the C., N. O. & T. P. R'y Co. in said State. (Tr. 57; second table with Goodwyn's affidavit, Tr. 62-63.)

12. The special rates prescribed in the Commission's order are *lower* than are charged and received by the appellant on the same commodities for the same distances on any of its *other* lines (over 1,500 miles in length) in any other section of the State of Kentucky.

Thus an unjust discrimination is established against other localities and shippers, and an undue preference given to the sixteen stations and the distillers located thereat, named in said order, in violation of the Kentucky Statutes (Section 817) and the Act to regulate commerce (Sections 2 and 3).

13. The rates complained of have been prescribed in absolute disregard of the laws of the State (Kentucky Statutes, Sec. 820), forbidding a railroad carrier to charge or receive any greater compensation in the aggregate for the transportation of property of like kind under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance. This is clearly illustrated by Mr. Compton's table of the rates and distances on the Lebanon Branch. (Tr. 54-5-6.) The circumstances and conditions are the same. (Tr. 56-7.) The like provision in Section 4 of the Act to regulate commerce is also disregarded by the Commission's rates where appellant carries interstate shipments of said commodities through the Cincinnati and Louisville crossings of the Ohio River to the points named in the order of August 10, 1910, on its existing interstate rates made up as they are by a combination of the rates north and south of the Ohio River.

14. The Commission's rates are unjust and unreasonable because the only way in which appellant can avoid the unjust discrimination and undue preferences above stated will be to put in said special rates adopted by the Commission, on said commodities and all other grain, in *any* quantities, upon *all* its lines, between *all* stations *both* ways, for the *same* or *similar* distances in Kentucky, on *both* intrastate and interstate shipments, thus entailing a loss in revenues of $54,000 annually, the amount stated in the amended bill, without any compensating re-

sults, and without any other parties having complained of such existing rates, beside the twenty-three distillery corporations at said sixteen stations. (First Amended Bill, Clause 10, Tr. 82; Compton's Affidavit, Clause 10, Tr. 58; Goodwyn's Affidavit, Clause 10, Tr. 64-5. Second Amended Bill, Tr. 119.)

15. The rates prescribed by the Commission are unusually and unreasonably low, both in and of themselves and relatively, and if put into force and effect will compel appellant to accept the same on both interstate and intrastate traffic and "will not yield to complainant a fair or reasonable compensation for the service performed, *and will deprive complainant, without due process of law, of the fair and reasonable return, which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment.*" (First Amended Bill, Clause 8, Tr. 81-2; Compton's affidavit, Clause 8, Tr. 57-8; Goodwyn's affidavit, Clause 9, Tr. 64.)

16. The rates prescribed by the Commission are *arbitrary and void*, because made *without any evidence* whatever showing or tending to prove appellant's existing rates are unjust, unreasonable, or extortionate, or that the former special rates adopted by the Commission are just or reasonable.

These *facts* are distinctly alleged in the original bill as amended and not controverted by answer, but stood admitted on the general demurrer.

The allegations in the bill on the latter point are as follows, speaking of the testimony in the proceeding before the Commission:

> There was *no testimony* by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that be-

came effective on the lines of railroad of complainant on March 10, 1910, and that have been charged, collected, and received by it for such service of transportation on the commodities named on and subsequent to said date, and *no evidence* was adduced in said proceedings that established the unjust or unreasonable nature of said rates or of any of them, or that said rates or any of them were or are extortionate. (Tr. 15-16.)

Again the bill charges:

There was *no evidence* introduced in said investigation or considered by said Commission showing or tending to show that this complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky, or between the points of origin and of destination aforementioned, were in and of themselves unjust, unreasonable, or extortionate. (Tr. 19.)

Still further (Tr. 20):

This complainant states absolutely that the evidence adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distillery purposes and it states that *no evidence whatsoever* was adduced at the hearing or investigation aforesaid which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said orders thereon were and are null and void.

17. Upon the same grounds the order granting reparation, if for no other reason, is void. The bill avers (Tr. 18):

> And the Commission did then find it to be a fact, *without any evidence whatsoever* having been presented before it in support thereof, that the complainants who are hereinbelow named, had paid to defendant (being complainant herein) the following sums in excess of just and reasonable rates for the transportation of said commodities, to and from said points, respectively, and that each of said complainants hereinafter named was by said order awarded sums respectively set opposite their names.

(Here follow in the bill the names of eighteen of the complainants and the amounts awarded to each of them.)

Again the bill charges (Tr. 19):

> *nor was there any evidence* introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding, or any of them, were entitled to receive as reparation from this complainant on account of previous payment by them, or any of them, of alleged unjust or unreasonable or extortionate rates.

The answer in the proceeding before the Commission denied that either of the plaintiffs was entitled to recover any sum of defendant by way of reparation. (Tr. 34-35.)

The only statement of *fact* in the affidavit of either defendant Siler or defendant Finn, which, in the remotest degree, had any bearing upon the question of the reasonableness of complainant's existing rates or of those prescribed by the Commission, is the following:

> Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force only a short time, and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those herein complained of. (Tr. 66 and 67-8.)

We submit that the mere fact that an increase has been made by a carrier is no evidence whatever that the

rate as increased is unreasonable, nor does even a legal presumption arise from such fact that it is unreasonable.

It was said by this court in *Lake Shore & M. S. R'y Co.* v. *Smith*, 173 U. S. 684, 697:

> What the company may choose *voluntarily* to do (sell mileage books at reduced rates) furnishes no criterion for the measurement of the power of a Legislature. Persons may voluntarily contract to do what no Legislature would have the power to compel them to do. *Nor does it furnish a standard by which to measure the reasonableness of the matter enacted by the Legislature.* The action of the company upon its own volition, *purely as a matter of internal administration, and in regard to the details of its business*, which it has the right to change at any moment, furnishes *no argument* for the existence of a power in the Legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

In that case the court further held that a State may provide by legislation for maximum rates of charges for railroads subject to the condition that they must be such as will admit of the carrier earning a compensation that will be just to it and the public, and whether they are or not is a *judicial* question.

In *Interstate Commerce Commission* v. *Chicago Great Western R'y Co.*, 209 U. S. 119-120, the court said:

> *It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier.* The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor; *but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done.* Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

If any other *fact* had been brought out in the investigation before the Commission than the mere withdrawal of the former special rates on distillers' supplies, and the application of the present standard rates of appellant on the same commodities, for the same distances, whether in intrastate or interstate commerce, moving both ways, to every shipper uniformly and alike, surely the appellees Siler and Finn would have stated such other fact or facts in their affidavits made and filed three weeks after the filing of the bill herein, but they did not do so.

A rate may be unreasonably low or not afford just compensation, and on that account be unreasonable, still it may produce some return for the service performed. It has been claimed that rates should be regarded as reasonable merely because they will produce *some* revenue. On this point Mr. Justice McKenna, then circuit judge, in *Southern Pacific Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. 236, said:

> This is claimed to be established by authority. I do not think so. It seems to have been decided in the *Dey* case, 35 Fed. 866. But the same learned judge who expressed that view in the *Dey* case retracted it in the *Ames* case, 64 Fed. 165, and it has received no judicial sanction since.

In *Houston & Texas Central R. R. Co.* v. *Storey*, 149 Fed. 499, it was held in ruling upon demurrers, particularly special demurrers to the bills, which present questions of great importance to plaintiffs and the people, the court should give to the allegations a *liberal* construction, to the end that the court may, upon consideration of all the proof, decide whether the rates prescribed are *reasonable*.

The case of *Chicago, M. & St. P. R'y Co.* v. *Minnesota*, 134 U. S. 418, so often referred to with approval by this court in its subsequent decisions, was not a case of

confiscation at all. It involved simply the question of the *reasonableness* of certain intrastate rates on milk, which the Railroad Commission of Minnesota had recommended that the Chicago, M. & St. P. R'y Co. put in effect from two interior cities to St. Paul and Minneapolis, and said railway company refused to do so. Upon the hearing of the application of the Commission for a mandamus in the Supreme Court of that State the railway company asked for a reference to take testimony on the issue as to whether the rates fixed by the Commission were *reasonable*, but the court refused such a reference on the ground that the statute did not contemplate or allow any issue to be made as to the equality or reasonableness of the rates and awarded a peremptory writ of mandamus. It was such a statute which did not allow (thus construed by the highest court of the State enacting it) a *judicial* hearing upon an issue as to the *reasonableness* of the Commission's rates made in pursuance of its provisions, that the Supreme Court of the United States held to be unconstitutional and void, without due process of law, in violation of the Fourteenth Amendment, not because it did not allow such a judicial hearing on an issue as to whether the rates fixed by the Commission were *confiscatory*, for that issue was not made in that case.

So, we claim here that it is not incumbent on appellant to allege or prove a case of actual *confiscation*, resulting from the application of the rates herein complained of. If it were, it would have to perform the impossible (for no railroad carrier can show the expense of carrying one commodity or a few commodities and arrive at its net revenue thereon), and it would have to submit to every reduction in its rates made by the Commission, a few at a time, by piece-meal, as it were, however unreasonable they may be, simply because out of appellant's remaining rates or whole body of rates, freight and passenger, it may

be able to earn a fair return on the value of all its properties devoted to intrastate business in Kentucky.

We feel sure this court will not hold that appellant must suffer such reductions in its revenues on account of unjust and unreasonable rates made by the Commission, without redress in a court of equity.

On this point the court is cited to the following cases decided by the Supreme Court of Texas:

> *Gulf, C. S. & S. F. R'y.* v. *Railroad Commission*, 113 S. W. 740;
> *S. C. on rehearing*, 116 S. W. 796;
> *Railroad Commission* v. *H. & T. C. R. R. Co.*, 38 S. W. 755.

In *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, this court, after holding that a railroad company may reasonably be required to furnish certain *facilities* and *conveniences* for the general public, even if the same afforded directly no increased income or involved an expenditure without direct compensating revenue, took care to say that its conclusion in that case was entirely consistent with a concession that rates fixed by a State Commission *on certain commodities might be so unreasonably low as to be unconstitutional, although the entire schedule of rates yielded an adequate return*, and with the further concession (page 26) that

> a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for *a wholly inadequate compensation a class or classes selected for legislative favor, even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier.*

To the same effect is the case of *Southern R'y Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, where the carrier was held to be entitled to a reasonable compensation or profit for a particular service over and above the cost of performing the same.

The court below held in substance that in a case concerning rates, before it can be claimed by a carrier that it is deprived of its property without due process of law, it is necessary to allege and show that the rates fixed for its observance by a Legislature or Commission are *confiscatory;* that an allegation that such rates are unreasonable and unjust for the service performed is not sufficient to entitle the complainant to relief in a court of equity, using this language (Tr. 97; 186 Fed. 189):

> As regards the claim that the constitutional guaranty of due process is violated by the rate order, the inquiry is whether the bill and affidavits show that complainant would through enforcement of the new rates be deprived of property. No averment is made either in terms or effect that the new rates would not yield a profit to the carrier; much less that the entire business would not do so. In the absence of a showing that property is taken, the protection of this guaranty cannot be invoked. What may be a reasonable rate or return, as a matter of legal policy, having due regard to encouraging the investment of capital in railroad enterprises is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question.

Again, in the same connection, the court below states (Tr. 98; 186 Fed. 190-91):

> But the bill does not clearly tender an issue that can be said to involve confiscatory rates, and complainant's counsel state in their brief that complainant is not bound in this case to allege or prove that the new rates are confiscatory, and upon an oral argument the same counsel expressly disclaimed a purpose to rely upon any contention that the new rates are confiscatory.

What was conceded in oral argument by appellant's counsel was that the bill as amended did not claim the rates fixed by the Commission would result in the confiscation of appellant's property on its entire intrastate business in Kentucky, but, as alleged therein, such rates were unreasonable, unjust, arbitrary, discriminatory, and would not yield appellant a fair or reasonable compensation for the services performed, but would deprive it, without due process of law, of the fair and reasonable return which it is entitled to earn upon the value of the property it devotes to said service or to the public use, with respect to such intrastate traffic, as well as to such interstate traffic, as was therein described, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Par. XX, Tr. 80-2.)

Appellant' bill in connection with its first and second amended bills shows what it *really* claims with respect to the rates complained of. We insisted in argument in the court below, as we insist in this court, it is not essential that appellant shall allege and prove the set of rates fixed by the Commission, if put into force and effect, will result in the confiscation of its property devoted to its entire intrastate business in Kentucky, under its whole body of intrastate passenger and freight rates on all classes and commodities in that State, before it is entitled to relief in a court of equity by injunction against rates that are unreasonable and unjust and which do not yield to it just compensation for the services performed.

We further insist that, on the question of the reasonableness of such rates, appellant is entitled to a *judicial* investigation and review. We do not understand this court to have ever held otherwise. We claim that to compel a carrier to accept, under the order of a Commission which is made final and conclusive, without the right of a judicial review, unjust and unreasonably low rates, or

those which do not yield it just compensation for the service performed, is *confiscation pro tanto,* and a taking of property without due process of law.

This court in the case of *Chicago, M. & St. P. Ry. Co. v. Minnesota,* 134 U. S. 456-7-8, speaking of the statute as construed by the Supreme Court of Minnesota, said:

> The rates recommended and published by the Commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but *final and conclusive* as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the Commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the Commission. In other words, *although the Railroad Company is forbidden* to establish rates that are *not equal and reasonable*, there is *no power in the courts* to stay the hands of the Commission *if it chooses to establish rates that are unequal and unreasonable.*

And again:

> The *question of the reasonableness of a rate* or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is *eminently a question for judicial investigation*, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by *judicial* machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive

> reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

This case was expressly re-affirmed by this court in the late case of *Ex parte Young*, 209 U. S. 147, where this court said:

> *If the law be such as to make the decision of the Legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional.* Chicago, etc. Railway Co. v. Minnesota, 134 U. S. 418.

As bearing upon the very point here under discussion we call attention to the case of *Louisiana R. R. Comm.* v. *Cumberland Telephone Co.*, 212 U. S. 414. That was a rate case originating in the Federal Court, and while it involved rates fixed by a State Commission, yet the court calls attention to the fact that the jurisdiction of the Federal Court was rested on the diversity of citizenship of the parties, as well as on the claim that the complainant's property was taken without due process of law; so that a Federal Court in that case could consider whether or not the *statute* or *constitution* of the *State* had been violated, as well as the question of the violation of the Constitution of the United States. Referring to this, this court said (Ib. 420):

> The single question before us is as to the character of the rates provided in Order No. 552, whether such rates are *confiscatory*, or, *if there is any difference*, whether the rates are only *unreasonable*, *unjust* and *inadequate*, although *not confiscatory*, and therefore not in violation of the Federal Constitution. The question under Articles 284 and 285 of the Constitution of Louisiana, *supra*, even of the *unreasonableness* of the rates, may be inquired into by a Federal Court, by reason of the diverse citizenship of parties to this suit, and the complainant is not confined to a State court upon this question. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

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> The complainant comes into court on *both grounds*, asserting that the rates are so low as to take its property in violation of the Fourteenth Amendment to the *Federal Constitution*, and *also* that the rates are so low as to be *unreasonable* and *unjust* under the above cited articles of the Constitution of Louisiana.

At common law a common carrier in Kentucky is entitled to just and reasonable compensation for the services it performs; and in the McChord Act itself and in Section 816, Kentucky Statutes (if still effective for any purpose, since it was held to be void for uncertainty so far as it prescribed a penalty for the offense of extortion in *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132), the right of every railroad common carrier to a just and reasonable rate, toll, or compensation for the transportation of passengers or freight in Kentucky, is as distinctly recognized as if such right had been expressly declared and vouchsafed therein as it is in the articles of the Louisiana Constitution referred to in the case last cited.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 95, speaking of one engaged in a business where the State has the power to regulate the charges for his public service, this court said:

> Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because, by reason of the multitude, the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge

> is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for *each separate service* that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large.

And when the contention was made in the recent North Dakota coal case that, notwithstanding the fact that the company was able to make a fair profit upon its whole business within the State, there was no constitutional power to require it to carry a particular commodity at cost or possibly below—in other words, where the constitutional right to measure the charge by the service was involved—this court expressly reserved the question, requiring that the disputed rates should be put into effect,

> but without prejudice to the right of the railroad company to re-open the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal.

(*Northern Pacific Ry.* v. *North Dakota*, 216 U. S. 580.)

In *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257, the question involved was the reasonableness of rates fixed by the State Commission on hard coal in car load lots. The carrier did not claim or show the rates attacked would be unprofitable. On this point this court said (Ib. 265) the rate complained of

> was not met by any showing that at the rates fixed by the Commission there would be no profit or an *insufficient* profit upon the coal so transported.

And further (Ib. 268):

> Obviously such a reduction could not be shown to be *unreasonable* simply by proving that, if applied to *all classes of freight*, it would result in an *unreasonably low rate*.

One of the questions in that case was "whether the tariff fixed by the Commission (on coal) is wholly inadequate and not compensatory."

The court below in the case at bar quotes the following clause from Mr. Justice Brown's opinion concerning the question above quoted in that case, occurring at page 267 (Tr. 98):

> *While we have never decided that the Commission may compel such reductions*, we do not think it beyond the power of the State Commission *to reduce* the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission *in this particular*.

Judging from the context this comment may have referred to the power of the Commission to require the carrier to reduce its rates to meet competition, but, in any event, it seems to us, the latter part of this clause was clearly a *dictum* upon a question of power in the Commission not presented for the decision of this court, which decided the case upon the ground that the railroad company had failed to establish the fact of the unprofitableness or unreasonableness of the rate complained of which it had attempted ineffectually to prove.

It is clearly indicated by this court, in that case, however, that had direct or competent testimony of facts showing the unprofitableness or unreasonableness of the particular rate contested been introduced, it would have been held to be admissible, and the fair implication from the opinion is that, if such testimony had been sufficient for that purpose, the rate in controversy would have been set aside on that account.

It may, therefore, be fairly claimed that the proposition that a common carrier has a right to charge and

collect just and reasonable compensation for each service has never been rejected by this court. The cases in which this court has defined the jurisdiction of a court of equity to inquire into the facts on which the Interstate Commerce Commission or a State Commission based its action have been cases where the wisdom of a mere regulation or practice of the carrier, and no question of the reasonableness of rates or constitutional rights, was involved. (*Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452; *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, Ib. 481; *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co.*, 220 U. S. 235).

We here quote from the forcible argument and apt illustrations employed by a distinguished attorney in a case before the Commerce Court involving the power of the Federal Courts to review an order of the Interstate Commerce Commission fixing rates for the future observance of a carrier, which are alleged and shown to be unjust and unreasonable although not confiscatory, in the sense that word is ordinarily used, as follows:

> The Constitution of the United States vests in Congress the power to prescribe rates for the transportation of interstate commerce, subject, however, to the limitation that no person shall be deprived of his property without due process of law. Under this grant of power Congress has prescribed a rule with reference to such rates, to-wit: that they shall be "just and reasonable," and has created a Commission, called the Interstate Commerce Commission, and has authorized it, under certain conditions named in the Act, to fix such rates within this rule. The rule applies equally, whether the rates be fixed by the carrier or by the Commission. The Commission has fixed certain rates and has ordered that they shall continue for two years. It is insisted by the carrier affected that they are not just and reasonable, and that they are not, therefore, within the limitation prescribed for the Commission by the statute. In re-

sponse, it is urged that the Commission is the sole judge of whether or not rates are reasonable, unless it can be shown that they are unconstitutional, to-wit: confiscatory. In other words, it is insisted that the courts may determine whether or not the Commission has violated the limitation imposed by the *Constitution*, but that they can not determine whether or not the Commission has violated the limitation imposed by the *Act of Congress*. If this be true, then we see no escape from the proposition that Congress has delegated to the Commission the *sole power which Congress itself has* over the subject of prescribing rates for the future, and such a delegation of power, we submit, is unlawful.

Let us suppose a case: Suppose Congress itself should undertake to fix a rate and that this rate should be attacked as unlawful. We may well suppose the following colloquy might occur in such a controversy in testing the validity of the Congressional action:

Q. Is the power of Congress to prescribe rates for the future a limited or an unlimited power?

A. It is a limited power.

Q. By what is it limited?

A. By the Constitution.

Q. Suppose it be claimed that Congress has passed the limitation placed upon its power by the Constitution and has made a rate that is confiscatory, thus depriving a carrier of his property without due process of law, *who then is to determine this question?* Is Congress alone to determine it, or must the courts determine it?

The old advocates for the independence of Congress asserted that the legislative power, the judicial power, and the executive power of the Government were co-ordinate, and that, therefore, when Congress acted there was no power in any court to determine whether or not its action was valid. The Supreme Court of the United States, however, in the case of *Marbury* v. *Madison*, 1 Cranch, responded to this claim with the following language which has never been answered, to-wit (p. 176):

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if

these limits may, at any time, be passed by those intended to be restrained?"

And again, in answering the doctrine of the Congressional advocates, the court said (Ib. 178):

"It (this doctrine) would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

That reasoning by Chief Justice Marshall satisfied the American mind and from that day to this it has been an undisputed proposition that the courts of the United States can consider and determine whether or not an Act of Congress is in excess of the power given to Congress. And it is solely on that ground, and under the reasoning just mentioned, that a federal court to-day would have the power to say that, in fixing a rate for transportation (claimed to be confiscatory), Congress has exceeded the limit placed upon its power by the Constitution.

Then let us go one step further. Suppose that, instead of Congress attempting itself to fix a rate, it has prescribed a rule to the effect that all rates shall be "just and reasonable," and then has created a Commission and authorized it to fix rates *within the limitation of that rule*. And suppose when the Commission has thus fixed a rate, it is insisted that the same is unlawful, we could then imagine the following colloquy as occurring in such controversy:

Q. Is the power of the Commission to prescribe future rates a limited or an unlimited power?

A. It is a limited power.

Q. By what is it limited?

A. It is limited *both* by the Constitution, which limits the power even of Congress itself, and further by the Act of Congress which created the Commission.

Q. But suppose it be claimed that the Commission has *exceeded the limitations* thus placed upon its power, *who is to determine that question?*

> Our opponents in the case at bar answer this by saying that the courts can determine whether or not the Commission has acted in excess of the limitation imposed by the *Constitution*, but that they *can not* determine whether or not it has acted in excess of the limitation imposed by the *statute*. The course of reasoning which leads to this conclusion is inexplicable to us. We simply can not understand it. We do not comprehend upon what basis it rests. And treating the Act of Congress as the sole authority for the Commission, just as the Constitution is the sole authority for Congress, we may ask of the Commission, when acting within this expressly limited power, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Or again, with reference to the doctrine of our opponents, and merely substituting the word "Commission" for the word "Legislature" in Chief Justice Marshall's language, we may say, "It would declare that if the Commission shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. * * * It is prescribing limits, and declaring that those limits may be passed at pleasure."
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> We, therefore, insist on this line of reasoning, that this court has the power, and must exercise it, to determine whether or not the act of the Commission in prescribing future rates is within the limitation imposed upon it by the *statute*, which says that rates thus prescribed must be "just and reasonable," as well as within the limitation imposed by the *Constitution*.

If, in this quotation, we substitute "Kentucky Legislature" for "Congress" and "McChord Act" for "Act of Congress", and "State Commission" for "Interstate Commerce Commission", the foregoing argument may be well applied to the case at bar in support of the proposition that appellant is entitled to a judicial review of the order of the Kentucky Commission herein complained of, fixing, as it alleges, rates which are unjust and unreasonable for the services to be performed.

VI.

THE McCHORD ACT BY REASON OF ITS PENALTY PROVISIONS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF SECTION 1 OF THE FOURTEENTH AMENDMENT.

Errors assigned as V and VI will be discussed under this heading.

On the subject of burdensome penalties which preclude a resort to the courts to determine the reasonableness of rates, Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 100, said:

> Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?

Again at page 102 he said:

> It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only *after there has been a final determination of the validity of the statute*, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

The foregoing extracts from the opinion in that case were quoted in the recent case of *Ex parte Young* by Mr.

Justice Peckham reported in 209 U. S. 123, who, after doing so, proceeded at page 146 to state:

> The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents or employes of the company, the risk of imprisonment for years as a common felon.
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> See also *Mercantile Trust Co.* v. *Texas, etc., R'y Co.*, 51 Fed. 529-543; *Louisville, etc., R. R. Co.* v. *McChord*, 103 Fed. 216-223; *Consolidated Gas Co.* v. *Mayor*, 146 Fed. 150-153. In *McGahey* v. *Virginia*, 135 U. S. 662-694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all *the law is invalid*, although what is termed a remedy is in fact given. See also *Bronson* v. *Kinzie*, 1 How. 311, 317; *Seibert* v. *Lewis*, 122 U. S. 284. If the law be such as to make the decision of the Legislature or of a Commission *conclusive* as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, etc., R'y Co.* v. *Minnesota*, 134 U. S., *supra*. A *law* which directly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, *is also unconstitutional*. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.
>
> It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the Legislature is com-

plete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, *to close up all approaches to the courts*, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and, therefore, invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a *fact* which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the *jurisdiction of the Legislature is complete in any event.*

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possibly imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, *are unconstitutional on their face, without regard to the question of the insufficiency of those rates.*

By the McChord Act, should a railroad company, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense any sum not less than five hundred ($500) dollars, nor more than one thousand ($1,000) dollars, and upon a second conviction, in any sum not less than one thousand ($1,000) dollars, nor more than two thousand

($2,000) dollars, and for a third and succeeding convictions in any sum not less than two thousand ($2,000) dollars, nor more than five thousand ($5,000) dollars.

The said Act further provides that the circuit court of any county into or through which the line or lines of railroad carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

In the oral argument of this case in the court below the learned counsel for the appellees, while admitting the Commission had no *judicial* powers, contended the carrier, under the McChord Act, had choice of three courses, to-wit:

First, to obey the Commission's order and charge rates not in excess of those fixed by the order.

Second, to institute a suit in equity either in the State or Federal court within the ten days before the order becomes effective, or thereafter before the Commission has recommended that indictments be found, and try the question just as it is being done in this case.

Third, to decline to avail itself of equitable relief, *take chances* on the Commission not recommending indictments, and, should indictments be found, raise the constitutional questions by way of defense to the indictments.

The first course would mean an unqualified surrender of the carrier's rights to the Commission's rates, however unreasonable, confiscatory or discriminatory they might be.

The second course, so far as it relates to the carrier's right to institute a suit in a Federal court of equity, such

as this, is not, as already observed, by virtue of the Act or founded upon any provision therein, nor could it be. Its right to come into this court to contest the validity of the rates prescribed is based on the Federal Constitution and laws. The same access to the Federal court could be had and was availed of by the complainants in the *Minnesota Cases*, 134 U. S. 418, and 209 U. S. 123, but, nevertheless, this Court held the State statutes complained of therein to be unconstitutional and void.

The Act in question makes no provision for a suit by the carrier in a State court of equity, or any other court, to determine the reasonableness of the rates fixed by the Commission, or to supersede, suspend or enjoin their enforcement until that question of fact can be decided. It would, therefore, be entirely within the *discretion* of a State court of equity to withhold such relief, pending the suit. Appellant insists that the Act itself should provide *expressly* for an adequate judicial remedy, and that it is entitled thereto, *as a matter of right*, in the administration of "*due* process of law." If the State court of equity should refuse, as it may upon the application of the carrier, to enjoin the Commission from enforcing the rates prescribed by it, or to allow the carrier to supersede or suspend their operation pending the suit or until the question of reasonableness can be finally determined, by the execution of a bond or on other equitable terms, the rates complained of would go into full force and effect at the end of ten days after notice to the carrier or one of its employes. Meantime, the carrier would be at the mercy of the Commission, besides sustaining a daily loss, with no way to recover any part of it back, where the rates are unjust and unreasonable for the services performed.

The third course, suggested by appellees' counsel, that the carrier "*take chances* on the Commission not recom-

mending indictments;" in other words, on the Commission not discharging its sworn official duty (Section 821, Ky. Statutes), would be taking a fearful risk, which might result disastrously, not only for itself, but for its officers, agents and employes. But it is further suggested by appellees, if indictments are found, the carrier can "raise the constitutional questions by way of defense thereto." That is an extremely doubtful proposition. Nothing in the Act so provides, and if it contained such a provision, it would be simply a travesty of judicial procedure.

Appellant, as it alleges in its bill, owns and operates its lines in 57 counties of Kentucky. It has over 800 stations on these lines, at perhaps 500 of which its has agents whose duty it is to charge, collect and receive rates on intrastate freight. Thus, all of these agents may be indicted by grand juries on the Commission's recommendation, in their respective counties, for having in one day, perhaps the same day, charged, collected or received a higher rate on a separate intrastate shipment than that fixed therefor by the Commission. The penalty against each of them on conviction for the first offense can not be less than $500, and may be $1,000. Thus, fines aggregating from $250,000 to $500,000 might be imposed upon complainant's freight agents in Kentucky for one day's violations by each, or for their *first* offense. Certain decisions of the Kentucky Court of Appeals, construing similar acts, with respect to penalties, are cited by appellees' counsel, but the cases referred to are not parallel, for, in the statutes involved therein the penalties were aimed alone against the person or company indicted, while here not only the carrier but every one of its officers, agents and employes (hundreds in number) are subject to the heavy fines prescribed by the McChord Act, and each can and may be prosecuted for committing his own first, sec-

ond, third and subsequent offenses for having charged, collected or received a rate on a single shipment, in excess of that fixed thereon by the Commission's order; and a plea by one agent that another agent had been convicted of a similar offense, and since that conviction he (the agent making such plea) had not committed a like offense with respect to a separate and distinct shipment, would be unavailing as a bar to his own conviction. The three cases cited by appellees' counsel (in which the statutes construed were framed quite differently from the McChord Act) do not hold to the contrary. (*Wilson* v. *Commonwealth*, 26 Ky. Law Rep. 685; *Brown* v. *Commonwealth*, 100 Ky. 127; *Commonwealth* v. *Standard Oil Co.*, 120 Ky. 724.)

Nor does the Supreme Court in *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, hold otherwise. It is, therefore, an erroneous construction of the McChord Act to say that all violations of the Commission's order fixing rates thereunder prior to the first conviction of the carrier or of any of its officers, agents or employes constitute but a single offense, the maximum penalty for which is a fine of $1,000. Accepting, for the sake of argument, the construction which appellees place on the penalty clauses of the McChord Act, that the second offense to be punishable must be committed after the first conviction, the possible fines inflicted on appellant's agents therefor could not be less in the aggregate than $500,000, and might reach $1,000,000, and upon a third and each succeeding conviction they would amount to not less than $1,000,000, and might be as much as $2,500,000. These enormous burdens do not take into consideration the penalties which might be imposed upon the appellant itself and its officers, under the provisions of the Act. So, it is plain the doctrine laid down by this court in *Ex parte Young*, *supra*, with respect to the Minnesota statute, is applicable to the pen-

alty features of the McChord Act, which were clearly intended to "close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the Commission's order are not *too low*, and, therefore, invalid." The intended intimidation is as complete in the one case as in the other. While it is true no indictment against the carrier can be found by a grand jury unless recommended by the Commission (*Illinois Central R. R. Co.* v. *Commonwealth*, 23 Ky. Law R. 1159, 64 S. W. 975), the power is placed in its hands to set on foot hundreds of prosecutions against the carrier and its officers, agents and employes at the same time in every county in Kentucky in which the carrier's lines are owned or operated, thus completely paralyzing and destroying the carrier's power to carry on its business, unless it puts into effect the rates prescribed.

Of course, to enforce the rates in controversy here, the indictments would be in fewer counties and against fewer agents than if the reduced rates applied over all lines of the appellant in the State.

The statements of Commissioners, Siler and Finn, in their affidavits (Tr. 65 and 69) that they had not threatened to recommend indictments or institute criminal proceedings against appellant, and they do not intend to take any step looking to such criminal prosecutions for violations of the Commission's orders can not avail to prevent the granting of an injunction herein. It is their sworn official duty to take such steps. (Section 821, Kentucky Statutes.) It is not necessary to establish the fact that threats have been made. Besides they may and can change their minds at any time. Although, in the order of September 26, 1910 (Tr. 44), appellees had further time to file the affidavit of the other Commissioner (Tarlton) it was not filed. The present Commissioners can not bind

their successors in office, who will all be elected in November, 1911.

Appellees Siler and Finn in their said affidavits say they are advised and believe the Statutes of Kentucky afford ample opportunity to test the validity of the Commission's orders in the Civil Courts, but neither they nor their learned counsel point out where any statute of that State may be found. Furthermore, they cannot do so, for none exists. Yet, the court below in its opinion appears to hold that these affidavits, and the supposed lack of an averment in the bill that the rates complained of are confiscatory, operate to save the McChord Act from being held invalid on its face by reason of the enormous fines and penalties therein prescribed. (Tr. 101-2).

In this connection the court below again refers to the case of *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 120 Ky. 91, as authority for the proposition "that an order fixing *just rates* could be enforced in Kentucky by civil action." Nothing of the kind was decided in that case. That was not a rate case at all, and, as we have already seen, related solely to the enforcement of a special statute imposing the duty upon a railroad company to operate daily, except Sunday, at least one passenger train over its line each way, the suit having been brought in the name of the Commonwealth for that purpose by the Commonwealth's Attorney.

Section 273, Civil Code of Kentucky, also cited by the court below (Tr. 101), to sustain this proposition, has no application whatever, as it only provides when and by whom injunctions may be granted.

The impossibility of submitting a question of this character to and having it properly tried and determined by a jury in either a civil or criminal court has been settled in the following cases:

Louisville & Nashville R. R. Co. v. *Railroad Commission of Tennessee*, 19 Fed. 679.

Windsor Coal Co. v. *Chicago & Alton R. Co.*, 52 Fed. 716.

Van Patten v. *Chicago, etc., R'y Co.*, 81 Fed. 545.

Ex parte Young, 209 U. S. 164-5.

Upon the trial of indictments before juries, and in accordance with the ordinary criminal procedure, the railroad company would be given, according to the contention of appellees' counsel, the right of laying before the jury the complicated and intricate details of its operations and earnings for the purpose, if possible, of convincing the jury that the rate fixed by the Commission is unreasonably low. If in any case it succeeds in establishing this fact, it is simply relieved from the *penalty for that one shipment*. The rates still exist as a constant invitation to further indictments, and the company can have no assurance that the next jury may not decide on the same evidence that the Commission's rate is reasonable. If in any case the company fails to satisfy the jury that the rate is unreasonably low, the result is not *to require* the railroad company to charge that rate for the future, or to furnish it with any certain guide as to whether it should do so, but is to impose upon it a very heavy penalty for its having done the only thing it could do in order to bring about a judicial hearing in the statutory method, *i. e.*, declined to charge, collect or receive the rate fixed by the Commission. Surely, if a railroad company has any real constitutional right to a judicial investigation as to the reasonableness of rates fixed by a Commission, this sort of procedure is illusory and worthless. A favorable decision gives the company no protection for the future; an unfavorable decision imposes a heavy penalty upon it for having invoked judicial protection.

As a practical matter, therefore, the right, even if it exists, to have an inquiry upon the trial of an indictment into the reasonableness of the Commission's rates, would be absolutely of no value to the railroad company. The questions involved are so intricate, the results of jury trials, even of cases of the greatest simplicity, are so uncertain, and the penalties imposed are so severe that no railroad company could afford to refuse to comply with any rate which the Commission might make, and the result of the Act, with any such construction, would be exactly what was the obvious purpose of the Legislature—and that is, that the railroad companies should be *compelled* to charge the rates imposed by the Commission, no matter how low they might be. This is not *due* process of law, and it amounts to a denial to appellant of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment, as claimed in its bill.

But appellees' learned counsel say the *Ex parte Young Case*, 209 U. S. 148, differed from the case at bar and assert that the parenthetic clause used by Mr. Justice Peckham, "no prior hearing having ever been given," does not apply here as appellant had a hearing before the Commission. In using the phrase quoted, Mr. Justice Peckham manifestly meant no prior *judicial* hearing had been given. In "due process" the *form* of the hearing is often of more importance than the hearing itself, especially where, to use the language of Mr. Justice Peckham in the same opinion, "the validity of the Act depends upon the existence of a *fact* which can be *determined only after investigation* of a very complicated and technical character."

By this is meant a *judicial* investigation, for he is there pointing out the distinction, which he states is obvious, between an act, the validity of which depends on the existence of a fact, and "the ordinary case of a statute upon

a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event" (Ib. 148).

He further states:

> The provisions of the former class of acts, relating to the enforcement of rates either for freight or passengers, by imposing such enormous fines * * * as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, *without regard to the insufficiency of those rates.* (Ib. 148.)

But, if upon the general principle alone, and in the absence of special statutory authority, it could be argued successfully that a mandatory injunction or other proceedings to enforce a rate order of the Commission are proper, and by way of *defense* thereto an opportunity for a judicial investigation of the validity of the order is afforded the carrier, nevertheless, in the absence of a statute, and in view of the penal provisions of the McChord Act applicable to the facts of this case, such a proceeding on behalf of the Commonwealth could not be exclusive or prevent a suit in equity by the carrier to enjoin the enforcement of the order of the Commission.

This is all the more true in the present case, because of the drastic penal provisions found in the statutes. The railroad company can not be compelled to await the action of the Commission, or of grand juries or prosecuting attorneys, nor can it be compelled to depend upon favor, or discretion, or kindliness of the Railroad Commission.

Indeed it would seem that a proper construction of the McChord Act would limit the duties of the Commission, so far as concerns the enforcement of orders made under the provisions of that Act, to prosecutions in the criminal court. The elaborate provisions found in that Act for indictment and prosecution for violations of its provisions

and orders made thereunder are in striking contrast with the provisions of Section 819, Kentucky Statutes, which it appears to have superseded after that section was declared to be unconstitutional and void (99 Ky. 132). That section contains a provision making the railroad company liable civilly for damages to the party aggrieved to the amount of damages sustained, including cost of suit and reasonable attorney's fees. There is no provision of that kind in the McChord Act.

If it is the duty of the Railroad Commission to see to the enforcement of the laws concerning railroads and of its own orders as provided in Section 821, Kentucky Statutes, then it is as much its duty to appear before grand juries and see to the prosecution of violations of the law and of its orders by indictment and punishment thereunder, as it would be to proceed through the civil courts. The former duty is expressly provided for by statute, as left to implication at most.

The appellant can not be deprived by inference alone, and in the absence of statutory prescription, of its right to be an *actor* in appropriate proceedings for having decided the validity of rate orders of the Commission by an appeal to the courts of the United States, substantially as it has done in the present case.

There is nothing, either in the statutes or in the decided cases, to deprive appellant of that right.

VII.

APPELLANT'S CONTRACT RIGHT TO CHARGE AND RECEIVE THE MAXIMUM RATES FIXED BY ITS CHARTER.

Error assigned as VII will be discussed under this heading.

In *Louisville & Nashville Railroad Company* v. *Commonwealth*, 99 Ky. 134-5, the Court, after holding Sections 816 and 819, Kentucky Statutes, defining and prescribing the punishment of a railroad corporation for the offense of extortion in charging, collecting or receiving more than a just and reasonable rate, to be void to the extent and for the reasons therein stated, concluded its opinion, as follows:

> It may be observed further, however, that it would seem *singular*, if such a statute, *even if in all respects valid*, could be enforced against a carrier whose rates, *as fixed in its charter*, are in excess of the rates alleged to be excessive in the indictment. And this, *not* because such rates are secured by *an irrepealable contract*, a matter not now considered, *but simply because they at least remain the legal rates until changed by law*.

There it is plain the highest court in the State meant to hold that even if Sections 816 and 819 were in all respects valid, appellant can lawfully charge and receive the maximum rates prescribed by its charter so long as they are in excess of those alleged to be extortionate in an indictment, not because of an irrepealable contract, "but simply because they at least remain the legal rates until changed by law." We maintain these maximum rates have not been "changed by law." To take away ap-

pellant's right to charge and collect them, there must be found a statute *expressly* repealing its charter in that respect.

So, in *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. 225-6, the court on this point said:

> As applying especially to the Louisville & Nashville R. R. Co., the court is further of opinion that the Act can not be maintained, because, without attempting directly, and probably not at all, to repeal the provision of the charter of that company as to maximum rates, it still leaves it within the power of the Commission to make it a crime for that railroad to charge the rates which its charter expressly authorizes. Again, it is not to be inferred that, even if the charter of this company can be amended, it was done by *implication* by the Act before us.

Again, referring to the fact that appellant's charter was enacted prior to the Reservation Act of 1856, the court, in that case, raises a doubt as to whether its charter rates can be affected by subsequent legislation at all, without its consent, and proceeds to say:

> But whether so or not, it can only be done, if at all, *by language which is plain and unmistakable*, and not merely by so doubtful an *implication* as is presented here.

The contract between the State and appellant by virtue of the charter provision referred to remains in full force and effect until expressly revoked by an Act of the Legislature. The obligation of this contract can not be lawfully impaired in any other manner. To construe the orders of the Commission herein complained of so as to impair such obligation would be to work a violation of that provision of Sub-section 1, Section 10, Article 1, of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts," which is relied on by appellant in its amended bill. (Par. Tr. 78-80.)

While appellant has not, since its acceptance of the provisions of the present State constitution in 1902, an irrepealable contract with the State by the terms of which it has the right to charge and collect rates within the limits of its charter, it nevertheless has a contract which remains in force until expressly repealed. That contract made on March 5, 1850, when appellant's charter, by the Legislature was granted and approved by the Governor, nearly six years prior to the Reservation Act of 1856 (providing that all charters thereafter granted were subject to alteration, amendment or repeal), did not become repealable by the Legislature until appellant accepted the present State constitution on July 11, 1902, more than two years after the passage of the McChord Act on March 10, 1900. How appellant's charter provision with respect to maximum rates can be regarded by this court as repealed by the McChord Act, when at the date of the passage of the latter Act, admittedly no part of appellant's charter was subject to alteration, amendment or repeal by the Legislature, and did not become so subject until more than two years thereafter, we are unable to understand. It is not pretended by appellees' learned counsel, nor is it a fact, that the Legislature has passed any statute *since* July 11, 1902, which expressly or by implication, repealed the maximum rates provision in appellant's charter.

Section 573, Kentucky Statutes (relied on by appellees' counsel as a repeal, effective September 28, 1897, of the maximum rates provision in appellant's charter), is not applicable. That section is a part of the Corporation Act, approved April 5, 1893 (Carroll's Kentucky Statutes, Ed. 1909, pp. 380, 394), at which date said provision in appellant's charter, which was approved March 5, 1850, was not subject to repeal, nor did it become so until July 11, 1902,

more than nine years thereafter and nearly five years after the effective date of said repealing act.

But the Court of Appeals in 99 Ky. 142-3 said that appellant's maximum rates as fixed in its charter remained *"the legal rates until changed by law, not because such rates are secured by an irrepealable contract,"* a matter not then decided.

An instructive and decisive case on this question is that of *Pingree* v. *Michigan Central R. Co.*, 118 Michigan, 314; 76 N. W. 635.

In this connection the opinion of the Kentucky Court of Appeals, delivered June 12, 1908, in the case of *Louisville & Nashville Railroad Co.* v. *Robbins*, 33 Ky. Law Rep. 778; 111 S. W. 283, is in point. In that case a judgment was rendered by the Bullitt Circuit Court requiring the appellant, the Louisville & Nashville R. R. Co., to provide for appellee, Robbins, a proper wagon way across its right of way and railroad tracks so as to enable him to pass from one side of the railroad to the other, as he owned land on each side thereof, the duty to so provide such farm crossing being imposed upon appellant by its charter. But appellant set up the fact that it had in 1902 accepted the provisions of the present State constitution and that by reason thereof the provisions of its charter requiring it to construct farm crossings in such cases were repealed by the Kentucky Statutes on that subject, and those statutes, which were different and did not so require, took the place of said charter provision. The court, however, took a different view and said:

> In our opinion, the laws found in the Kentucky Statutes, with reference to farm crossings, were not intended to, and did not have the effect, to repeal the provisions of appellant's charter referred to. Appellant obtained its right of way through the State by virtue of its charter, it received donations of right of way, purchased and condemned the balance of the

> right of way, with the provision in its charter requiring it to construct such farm crossings, *thus entering into and forming a part of the contract* by which it obtained the right of way upon which to construct its road. This was an inducement, probably, to some to give right of way and induce others to sell at a less price, and in all probability lessened verdicts in cases in which it condemned the right of way, and it can not evade this liability which it assumed when it accepted its charter.
>
> For these reasons the judgment of the lower court is affirmed.

Now, if appellant must still bear the *burdens* and *liabilities* imposed upon it by its charter, notwithstanding its acceptance of the new Constitution, it is likewise entitled to the *benefits* and *privileges* granted by its charter, and nothing short of an express and absolute repeal, by an Act of the Legislature, can take away and destroy its right to charge and collect the maximum freight rates prescribed in its legislative charter, for that provision, too (as does the provision concerning farm crossings), still forms "a part of the contract" with the State, although such contract, in that respect, is subject to the right of the State to repeal it, but which right the State, since July 11, 1902, has not yet exercised by *express* enactment, nor by *necessary implication* from any existing general statute.

Practically all the authorities referred to in appellees' brief on this branch of the case are cited to support the proposition that the State of Kentucky did not make an *irrevocable* contract with appellant in granting it the right to charge and collect certain maximum freight rates as set out in its charter and the amendments thereto enacted prior to the Reservation Act of 1856. Many of these cases, however, do not sustain appellees' contention in that respect, but do support a different view, notably the *Sanford case*, 164 U. S. 586, where the contract was not

upheld on the ground, as the court held, it had not passed from the old to the new company.

Since appellant, in 1902, accepted the provisions of the present State Constitution, it is not insisted that it is any longer beyond the power of the Legislature to *expressly* repeal those provisions in its charter granting it the right to charge and collect certain maximum freight rates. It is claimed, however, that the Legislature has *not yet exercised that power*, and so long as it refrains from enacting such a repealing statute, its contract with the State in that respect remains unimpaired, and this is practically decided in the cases above cited of *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 142-3; *same* v. *Robbins*, 33 Ky. Law Rep. 778, 111 S. W. 283; *same* v. *McChord*, 103 Fed. 216, 225. These cases directly hold in effect that appellant's charter privileges have not been, and can not be, repealed by *implication* or general laws not made *expressly* applicable thereto.

The court below refers to Section 573, Kentucky Statutes, a part of the general corporation Act enacted April 5, 1893, which provides, in substance, that all provisions of all charters of corporations, inconsistent with that Act, to the extent of such conflict, and all powers, privileges or immunities of any such corporation, which could not be obtained under the provisions of said Act of April 5, 1893, should stand repealed on September 28, 1897 (nearly five years before appellant on July 11, 1902, accepted the present Constitution); and also refers to Section 816, Kentucky Statutes, undertaking to define "extortion," which was held void, as a penal statute, by the Court of Appeals in *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132, as probably working an *implied* repeal of appellant's charter provision fixing its maximum rates. Now, there was nothing in the Act of April 5, 1893, inconsistent or in conflict with appellant's said charter pro-

vision, so that Act did not operate to repeal the latter provision, as of September 28, 1897; and, furthermore, as above stated, said provision in appellant's charter did not, in any event, become repealable until July 11, 1902.

But the court below, apparently doubtful of its view that a repeal of the maximum rate provision in appellant's charter, was effected in that way, observes (Tr. 103):

> Even if complainant's right to maintain its charter rates was not repealed by Section 573 in connection with 816, it is clear that such right was repealed through enactment of the McChord law and complainant's subsequent acceptance of the provisions of the Constitution.

Now, if the McChord Act be invalid upon the grounds hereinabove urged, of course it did not work an implied repeal of the rate provision in appellant's charter. But if that Act be valid, it was enacted more than two years before appellant's charter provision became repealable, and there is no attempt therein to repeal said provision and the maximum rates prescribed in that provision (as the Court of Appeals has said in 99 Ky. 134-5) "remain the legal rates until changed by law." The case cited by the court below, *Missouri Pacific Ry. Co.* v. *Kansas*, 262, 274, does not appear to us to be conclusive against appellant on this point. There appellant claimed it had a contract right with the State, giving it the power to determine the time and manner of operating its trains, but conceded such contract was repealable when the Act was passed giving the Railroad Commission power over the same subject-matter. So this court said:

> The proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract.

But our concession does not go so far. We contend the Legislature on March 10, 1900, when it enacted the McChord Act, had no power to repeal the maximum rates provision in appellant's charter expressly or by implication, and has not attempted to do so in any Act *since* July 11, 1902, when by appellant's acceptance of the Constitution, said provision in its charter became, for the first time, repealable.

We further insist that by its legislative order of August 10, 1910, the Commission unlawfully undertook to impair appellant's existing contract with the State, whereby it was entitled to charge and collect rates within the maximum fixed by said provision.

It is alleged in appellant's first amended bill, after setting out the nature and terms of its said contract (Par. XIX, Tr. 80) that the Commission claimed such power under the McChord Act, and that said Act "*so construed* and the orders of August 10, 1910, in pursuance thereof, and herein complained of, impair the obligation of the contract," etc.

Appellant nowhere in this record concedes that this *construction* by the Commission of the McChord Act is the true and correct one.

VIII.

THE CERTIFICATION AND FILING OF THE ORDER OF AUGUST 10, 1910, AWARDING REPARATION TO THE PARTIES NAMED THEREIN SHOULD HAVE BEEN ENJOINED BY THE COURT BELOW.

Under this heading we will discuss errors assigned as IX, X and XI.

In its opinion the court below said (Tr. III):

> We do not pass upon the validity of the second order of the Commission. We think that the persons and companies in whose favor awards of reparation appear by the order to have been made are necessary parties in interest. They have not been brought into this suit.

This order awarding reparation to the parties who instituted the proceeding against appellant before the Commission will be found in the transcript of the record (pp. 29-30). It was made by the Commission, under the erroneous impression that Section 829, Kentucky Statutes, applied to a proceeding under the McChord Act. That section with other sections of the Kentucky Statutes referred to in this brief, will be found in an Appendix thereto for convenient reference.

It was asserted in the oral argument of appellees' counsel in the court below that if an action in the name of the Commonwealth for a writ of mandamus or to compel the carrier to obey the order of the Commission with respect to rates would *not* lie, then the Commission would have power to make an award under Section 829, Kentucky Statutes, which it is stated this Court in *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, found

to be still in force and applicable to the offense of extortion created by the McChord Act, and would also have the power to institute proceedings in court to enforce that award. Now, the court will find that in the case referred to this Court did *not* hold that Section 829, Kentucky Statutes, was still in force. The invalidity or enforcibility of that section was not in issue or before the court in that case. The only reference we have been able to find in the opinion of Chief Justice Fuller in that case concerning Section 829, is as follows (*Ib.* 490):

> By Section 829 the Commission was empowered to hear and determine complaints under Sections 816, 817 and 818 and to enforce their awards in the courts.

The applicability of that section to complaints under the McChord Act was not touched upon by this court, nor was the validity of the restrictions or limitations on the carrier in defense of claims awarded by the Commission, under the three sections mentioned, considered or passed on by this court.

The order awarding reparation is attacked by appellant on three distinct grounds, viz:

1. That the power of the Commission, if any it has, to award reparation is confined by the express terms of said section in proceedings where

> "the Commission shall hear and determine complaints under Sections 816, 817 and 818."

Those three sections and section 829 are parts of the Act approved April 5, 1893. Section 816 was declared void as a penal statute in *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132; and Section 818 was declared void as a penal statute in *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 20 Ky. Law Rep. 491-2, leaving only Section 817 which defines and deals alone with *unjust discriminations*.

It is practically conceded by appellees that the complaint of the Greenbrier Distillery Company and others against appellant before the Commission was made and filed under the McChord Act, approved March 10, 1900, and not under either of the three sections named in the outset of Section 829.

2. That Section 829 in unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Federal Constitution, by reason of the qualifying provision therein with respect to the trial in the Circuit Court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

> If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the Court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence.

3. That said award is arbitrary and void, as appellant alleges, because *no evidence* was introduced or considered by the Commission showing or tending to show the plaintiffs in the proceeding aforesaid had paid to appellant any sum or were entitled to receive as reparation on account of previous payment by them, or either of them, of alleged unjust, unreasonable or extortionate rates. (Tr. 18-19).

These *well pleaded facts* were not controverted by answer, but admitted by the general demurrer as true, and should have been so considered on the hearing of the motion for an interlocutory injunction.

Concerning the first objection to the validity of said order of reparation we claim that the foregoing section has no longer any operative force; that in point of fact, by reason of the decision of the Court of Appeals in *Louis-*

ville & Nashville Railroad Company v. *Commonwealth*, 99 Ky. 132, holding Section 816 of the Kentucky Statutes unconstitutional and void for uncertainty, so far at least as it is to be taken as a penal statute, Sec. 829 has since had nothing to operate upon.

Carroll's Kentucky Statutes, Edition of 1903, (which so far as the sections thereof pertain to the Railroad Commission's powers and duties, are the same as his Edition of 1909), was adopted by an Act of the Legislature, approved February 29, 1904 (Session Acts 1904, pp. 26-27), as is shown by Section 2290b of the latter edition. (See Appendix).

The court's attention is called to the qualifying clause or proviso to said adopting Act (Section 2290b), as follows:

> *Provided*, That this Act shall not be construed to render valid any *invalid* chapter or section or part thereof embraced in said statutes.

So, Secs. 816 and 819, held to be unconstitutional and void for uncertainty in the case last referred to, decided April 4, 1896, and Sec. 818 held to be likewise void in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, *supra*, decided June 23, 1898, are still void, and were not validated by said Act of the Legislature adopting Carroll's Edition of 1903 (now Section 2290b, Edition of 1909).

But, if that be not true, and Sec. 829 is to be treated as an existing statutory provision, it is, nevertheless, unconstitutional, because in the first and only *judicial* inquiry, concerning the unreasonableness and unjustness of rates for the collection of which reparation is to be awarded, the right of the parties to introduce all material and relevant evidence, and to the carrier to make all its legal defenses is prohibited by that section, which by depriving such carrier of its right to be heard and to make its de-

fenses, denies to it due process of law in violation of the Fourteenth Amendment.

a. By its express terms Section 829, so far at least as claims for reparation based upon the alleged extortionate nature of rates charged and collected are concerned, applies alone to Section 816 of the Kentucky Statutes. Thus it begins:

> The Commission shall hear and determine complaints under Sections 816, 817 and 818. *Such* complaints shall be made in writing, etc.

It is not competent, therefore, for the Commission to apply the provisions of Section 829 to any proceeding under the McChord Act. It will be remembered that, under the latter Act (Section 820a), the offense of extortion consists in the railroad company or corporation, or any officer, agent or employe thereof charging, collecting or receiving *a greater or higher rate, toll or compensation than that fixed by the Commission, as in said Act provided.* And in such case not only is the corporation or company, but all the officers, agents or employes thereof collecting, charging or receiving such rates are to be deemed guilty of extortion. But there can be no extortion or reparation except for amounts charged and received *after* the effective date of the commission's order, and then only for the amount charged and collected in excess of the rate fixed by that body.

Under the terms of Section 816, on the other hand, the offense of extortion consists in the Act of the "railroad corporation" charging, collecting or receiving more than a just and reasonable rate, toll or compensation. It follows, therefore, that the power of the Commission to make an award can be applied only to cases where it is shown that the railroad corporation has charged, collected and received more than a just and reasonable rate. In-

asmuch as neither Section 816 nor 829 expressly prescribe a standard of justness and reasonableness, it follows that there is no standard by which even the Commission can make an award, or the Commission must, in making the award, also adjudge the rate that was charged, collected and received to be unjust and unreasonable. If the former construction is the sound one, then Section 829, taken in connection with Section 816, must be declared void for uncertainty, under the ruling in 99 Ky. 132, *supra*. If the latter construction is the sound one, then we have the case of a commission, a mere administrative body, performing the *judicial* function of adjudging a rate to be unjust and unreasonable. At this point, however, we wish rather to emphasize the fact that the power provided in Section 829 for awarding reparation, so far at least as it relates to extortionate rates, applies alone to Section 816, and can not be applied to the provisions of the McChord Act which was enacted in the year 1900, long after Section 829 became a law, which was on April 5, 1893.

b. The McChord Act has been heretofore set forth *in extenso*. It contains no provision relating to reparation; indeed, its provisions are rigidly confined to the fixing of rates to be applied in the future and to the prosecution of companies, corporations, their officers, agents and employes for committing that offense, called "extortion," which consists in charging, collecting or receiving more than the rates so fixed by the Commission.

c. That the proceeding of the Greenbrier Distillery Company, *et al.*, complainants, v. Louisville & Nashville Railroad Company, defendant, before the commission, hereinabove set forth, was had under the provisions of the McChord Act will not we conceive be denied by the appellees.

This court will note that it was in the same proceeding, under the same title, upon the same pleadings and evi-

dence, that the orders of August 10, 1910, were entered; that in each of said orders it was adjudged that the rates theretofore charged, collected and received were unjust, unreasonable and extortionate. Thereupon, the one order proceeds to fix rates to be charged in the future, and the other order proceeds to award reparation for excess of rates alleged to have been charged and collected in the past.

Inasmuch, however, as the McChord Act contains no provision for awarding reparation, the attempt of the Commission in that respect was without authority of law, and the order awarding reparation is void.

If for any reason it may be thought the decision of the Commission that the rates charged, collected and received by the appellant, under its tariff of March 25, 1910, could be made under the provisions of Section 829, Kentucky Statutes, and that an award of reparation could then be made, all independently of the proceeding under the McChord Act, or at all, it is nevertheless true that Section 829 affords no basis therefor.

It will be remembered from the language of that section that the Commission is required to hear and reduce to writing all evidence adduced by the parties and to render such award as may be proper; moreover, if an award of the Commission is not satisfied within ten days after same is rendered, the chairman is required to file a copy thereof and the evidence heard, in the office of the clerk of the circuit court of the county which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court is then required to enter the same on the docket for trial. Summons having been issued, as in other cases, against the party against whom the award was rendered, requiring it to appear in court within the time allowed in ordinary cases and to show cause why said award shall not be satisfied, it is further

provided that if the party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. But if a trial is demanded, the case shall be tried in all respects, as other ordinary cases in which the same amount is involved, provided that *"no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence,"* and the judgment and proceedings thereon shall be the same as in other ordinary cases.

Now, it is a fact that the Commission is an administrative body, and has no judicial powers. In order to make an award under Section 829, it must exercise the judicial function of hearing evidence and determining that a given rate that has been charged and collected is unreasonable and unjust and, therefore, extortionate. It must, moreover, perform the further judicial function of adjudging that the complainant is or not entitled to recover a given sum from the defendant. But inasmuch as the Commission is an administrative body, as was admitted by the learned counsel for appellees in the court below, the proceedings before the Commission, while it is hearing and determining the reasonableness of a rate, and the right of recovery by way of reparation, can not be considered as judicial proceedings. The greatest effect that can be given to them is that they are in aid of a court established by law for hearing and determining both questions.

The Congress of the United States has recognized the function of the Interstate Commerce Commission in this regard, and in providing that if the carrier does not comply with an order for the payment of money suit may be brought thereon in a circuit court of the United States,

which shall proceed in all respects as in other civil suits for damages, and therein the "findings and order of the Commission shall be *prima facia* evidence of the facts therein stated." (Sec. 16 of the Act to Regulate Commerce as amended June 18, 1910.) In such cases, of course, the defendant carrier would be given the opportunity of a hearing in that court, and allowed to introduce such other relevant evidence as it might choose to offer to be given such effect in overcoming the *prima facia* case made by the findings and order of the Commission, as the same would be entitled to.

By the provisions of Section 829, each party, both claimant and railroad company, is in the circuit court of the State, precluded from introducing all its evidence that may be relevant, material, or otherwise competent, and that is the only court in which such evidence might otherwise have been introduced or heard. That evidence might not have been produced before the Commission, or the Commission may have rejected it (though offered) erroneously on the supposition that it was incompetent or irrelevant, and such offered testimony would not, therefore, appear in the copy of the "evidence *heard* by the Commission," and it may even be that it could have been produced by the exercise of reasonable diligence, or the circuit court may not be satisfied, in spite of the sworn testimony to that effect that it could not have been produced before the Commission by reasonable diligence.

The effect of the statute is, therefore, to deny to the parties the right to introduce before the court, material and competent evidence affecting the matter in contest, and so far as concerns the carrier defendant, to deny to it the right to make a defense based upon such evidence.

A statute that does this denies to the carrier due process of law. It excludes by statute such evidence from consideration in the judicial investigation and does not

differ in principle from giving to the order of the Commission a *conclusive* effect. As was said in *Hovey* v. *Elliott*, 167 U. S. 407-413:

> The fundamental conception of a court of justice is to condemn only after hearing.

Wigmore on Evidence, Volume II, Section 1353, says:

> It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of *conclusive* evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province.

We submit that nothing could be stronger than this quotation from that learned text-writer. In truth, it is a judicial function to apply the law, and to apply the law necessarily involves the determination of the facts, and to withhold from the consideration of the judiciary a part of the facts or evidence in support of them, is to deny to the judiciary the power to determine the facts or to investigate the evidence as a basis for that determination. To withhold from the consideration of the judiciary some of the competent and material evidence, is indeed to forbid the judiciary to exercise an indestructible judicial function.

In *Birdsong* v. *Brooks*, 7 Ga. 88-92, the court in holding a statutory recital to be not conclusive, said:

> The Legislature has no power to legislate the truth of facts. Whether facts upon which rights de-

> pend are true or false, is an inquiry for the courts to make, under legal forms; it belongs to the judicial department of the government.

To give by legislation conclusive effect to any evidence of a fact affecting the matter in contention, or to exclude from the consideration of the court material evidence of a fact affecting the matter in contention, is in very truth to deny to the litigant the right to be heard in his own defense, and that is to deprive him of due process of law. To do either of said acts under compulsion from the Legislature is to do in principle what was condemned by this court in *Hovey* v. *Elliott*, *supra*. There the court, in its plenary power, to punish for contempt, refused to allow one to answer who had been guilty of contempt, and struck his answer from the files and suppressed his testimony, and condemned him without consideration thereof, and without a hearing, the court said:

> To say that the courts have inherent power to deny all right to defend an action and to render decrees without any hearing, then is, in the very nature of things to convert the court exercising such an authority into an instrument of wrong and oppression and hence to strip it of that attribute of justice upon which the exercise of a judicial power necessarily depends.

In the course of the opinion in that case, the court quotes with approval the language of Mr. Justice Field in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, as follows:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of the court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Then this court in *Hovey* v. *Elliott*, *supra*, goes on with these significant words, pages 414-415:

> That there must be a notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.

Further on page 417, this court continues:

> Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

We refrain from referring to other authorities upon a proposition that seems so clear and indisputable.

Section 829 instead of providing denies to appellant the equal protection of the laws and deprives it of its property without due process of law, and is therefore void.

Again, it is stated in the brief of appellees' counsel that the Commission under its *general* powers can make an award and proceed to have it enforced in the courts. We do not, by any means, concede this proposition. On the contrary the Commission has no powers except such as have been *expressly* granted by the State Constitution or the Legislature. This has been repeatedly decided and settled beyond controversy.

In *Chicago, I. & L. R'y Co.* v. *Railroad Commissioners of Indiana*, 38 Ind. App. 439, the court, at page 459, states:

> The power possessed by the Commission is only such as the statute gives it. The method by which it is to proceed is pointed out. If this method is not pursued its action is a nullity. The whole proceeding is a special statutory one and certain steps must be taken before the Commission has any authority to proceed.

In *State* v. *Chicago, M. & St. P. R'y Co.*, 16 S. D. 517, 94 N. W. 407, the court said that railroad commissions "are mere creatures of the statute and possess no power except what the statute *expressly* confers upon them."

Again, in *Board of Railroad Commissioners* v. *Oregon Railway & Navigation Co.*, 17 Or. 65, 19 Pac. 702, it is said at page 75 of the former, and 706, 707 of the latter:

> The jurisdiction of such commissions is not given by *implication*. Commissions of that character are creatures of the statute and possess no power except what the statute *expressly* confers upon them.

The same principle is announced in the case of *Interstate Commerce Commission* v. *C., N. O. & T. P. R'y Co.*, 167 U. S. 479, 494.

In *Elliott on Railroads* (2d Ed.), Vol. 2, Sec. 684, the author states:

> The general rule is that the jurisdiction of a statutory tribunal will not be extended by implication except in cases where the implication necessarily arises from a consideration of the objects or language of the statute. The rule that, where new rights are created and new remedies prescribed, the construction of the statute creating such rights and prescribing such remedies shall be *strict*, is an influential one.

This court so decided this question in *Siler, et al.* v. *Louisville & Nashville Railroad Co.*, 213 U. S. 175.

It will be observed that Section 829, Kentucky Statutes (if it were to be regarded as applicable or valid for any purpose), provides that the procedure to recover on any award made against a railroad carrier shall be as in an "ordinary" case in the circuit court, wherein the chairman of the Commission has filed a copy of the evidence heard by the Commission. An "ordinary action" under the Civil Code of Kentucky (Sec. 6) is an action at law. In the proceeding before the Commission brought by the Greenbrier Distillery Company and others, there were eighteen awards made, thus necessitating that many suits at law to be defended and tried out before a jury, in each of which the issue involved would require an investigation and determination of the reasonableness of appellant's existing rates and the unreasonableness of those prescribed by the Commission in lieu thereof. Yet the learned counsel for appellees, in the face of all the decisions, State and Federal, to the contrary, seemingly in earnest, tell us the appellant, under these circumstances and conditions, in a case of this nature, is afforded "*due* process of law" and has "an adequate remedy at law."

It is insisted that the court below erred in holding the Greenbrier Distillery Company and other plaintiffs in the

proceeding before the Commission were necessary parties defendant, and in not passing on the validity of the order of reparation because they had not been brought into this suit. Those plaintiffs had no right of action against appellant under the provisions of Section 829, even if valid, until the Chairman of the Commission filed a copy of the awards and the evidence heard in the office of the clerk of the Circuit Court of the county having jurisdiction. Such Chairman is the representative, in this respect, of said plaintiffs, and it was only necessary to make him a party defendant herein, and to enjoin him from taking such action. The restraining order granted upon the filing of the original bill and continued in force by the court below not only restrains the Commission from enforcing its first order of August 10, 1910, fixing rates for appellant's observance in the future, but also restrains the Chairman of the Commission from filing a certified copy of the awards made by its second order on the same date, with or without the evidence heard, in such clerk's office. (Tr. 40-42.)

The Greenbrier Distillery Company and other plaintiffs in the proceeding against the appellant before the Commission, which culminated in the entry of both of said orders, were no more necessary parties defendant in this suit with respect to the second order, than they were with respect to the first order. As heretofore pointed out, said orders really constitute but one judgment in the same proceeding at the same time involving the same controversy between the same parties. If we are correct in our contention that this second order, making awards as aforesaid, is illegal and void upon any of the grounds above set forth, the court below erred in not passing on its validity, and in denying appellant's motion for an interlocutory injunction enjoining the taking of any steps by the Chairman of the Commission looking to its enforcement.

If, however, this Court shall not reverse, but sustain the court below in its ruling that the eighteen corporations to whom said awards were severally made are necessary parties defendant to this suit, so far as it seeks to enjoin the enforcement of the second order referred to, then we respectfully submit that it would be proper and equitable for this court to direct the court below to allow appellant a reasonable time in which to bring said corporations into this suit, and, meantime, to continue said restraining order in force, in order to avoid a multiplicity of suits, which would necessarily result from permitting the Chairman of the Commission to file a copy of said eighteen awards in the office of the circuit court of the county having jurisdiction of such controversy.

IX.

THE ENFORCEMENT OF THE COMMISSION'S RATE ORDER SHOULD HAVE BEEN ENJOINED TO PREVENT UNJUST DISCRIMINATIONS AND UNDUE PREFERENCES, IN CONTRAVENTION OF THE PROVISIONS OF SECTIONS 817 AND 818, KENTUCKY STATUTES.

Under this heading errors assigned as XIII and XIV will be discussed. Section 817, Kentucky Statutes, prohibits a railroad corporation from directly or indirectly, by any special rate or otherwise, charging, collecting or receiving from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic.

Section 818 prohibits any corporation from making or giving any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or from subjecting any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage.

In its second amended bill appellant, in substance, alleges (Tr. 118-19) that *prior* to February 10, 1910, *its special rates on distillers' supplies*, or the articles and commodities set out in said order of August 10, 1910, were applied on *both interstate and intrastate traffic* to forty-eight stations in all on its lines in Kentucky, including the six-

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teen named in said order, where distillery plants were, have been since, and are still located, the names of all of which stations are given; that from February 10, 1910, to March 25, 1910, its said special rates on distillers' supplies were applied on *intrastate traffic* to all of said forty-eight stations; and that since March 25, 1910, its *present rates*, as covered by tariffs on file with the State Commission and Interstate Commerce Commission, have been applied and are still in force from Louisville, Covington and Newport, Kentucky, to all of said forty-eight stations on such supplies, articles or commodities in quantities as set forth in said order.

Appellant there further alleges that the volume or movement in said supplies, articles and commodities from said cities on the Ohio river to the thirty-two stations at which distillery plants are located, *other* than the sixteen named in said order, has heretofore been and will continue to be at least three times as great as the volume or movement thereof from and through said Ohio river cities to the sixteen points covered by said order; and appellant's loss in revenue, if it is compelled to put in the rates prescribed by said order to said thirty-two stations from said cities in Kentucky will be at least three times as great as its loss in revenue will be on account of having to put in the reduced rates prescribed by said order from said Ohio river cities to the sixteen points named in said order, or will be a loss of at least $54,000 annually in its rates, intrastate and interstate, on such shipments to said thirty-two distillery stations, as compared with a loss of at least $18,600 on intrastate and interstate shipments to said sixteen distillery stations; and that these losses will be exclusive of those on shipments of like commodities to consignees *other* than distillers at said points, which if included, would make the total losses to appellant very much larger per annum.

Appellant also alleges that at least one-half of the volume or movement of such supplies, articles and commodities to said thirty-two distillery points has heretofore been and will continue to be in interstate commerce, entering the State of Kentucky at the Cincinnati and Louisville crossings of the Ohio river; and if appellant should be compelled to apply the rates prescribed by said order to such interstate shipments to said thirty-two distillery stations, its loss on its interstate revenues will be at least $27,000 annually, and its loss on its intrastate shipments to said thirty-two distillery stations will be as much as the last named amount annually.

It is our purpose to deal in this part of our brief with the foregoing averments only so far as they pertain to intrastate traffic, and to discuss the interstate commerce features further on.

In the concluding paragraph of the same pleading is the following averment (Tr. 120):

> The complainant further states that it cannot obey the provisions of said order with respect to the sixteen distillery stations alone out of the forty-eight distillery stations in all on its lines in Kentucky, without violating the provisions of Section 817, Kentucky Statutes, against unjust discrimination, and the provisions of 818, Kentucky Statutes, against making or giving undue or unreasonable preferences or advantages and against creating undue or unreasonable prejudice or disadvantage, and the necessary result of putting in the rates under the Commission's order would be to compel complainant to reduce the intrastate rates proportionately to each of said other thirty-two stations at which distilleries are located, or to violate the provisions of the Kentucky Statutes aforesaid.

It is difficult to explain and illustrate the unjust discriminations and undue preferences against other shippers and localities without a map before the court, showing the location of the sixteen distillery stations set out in the

order complained of, and the location of the other thirty-two distillery stations, on appellant's lines in Kentucky, but assuming this court may take judicial notice of the Railroad Map issued by the Commission of that State for 1910, we submit in the Appendix to this brief a diagram based on a section of that map, drawn on a smaller scale, on which will be found the names and locations of the Ohio River cities referred to, the several lines of appellant, the names and locations of said forty-eight distillery stations, the sixteen covered by the Commission's order being designated in black, and the other thirty-two in white circles. The distances from Louisville, Covington and Newport to these forty-eight distillery stations, respectively, are taken from statements Nos. 3 and 4, made exhibits with appellant's second amended bill (Tr. 120-121), and the tables embodied in the affidavits of Compton and Goodwyn. (Tr. 55; 63, 64.)

With this diagram or abbreviated map before the court we hope to be able to demonstrate the correctness of our claim that the Commission's rates are, on their face, unjust, unreasonable, unjustly discriminatory, and unduly or unreasonably preferential or prejudicial as between persons and localities.

Now, taking the Main Stem line, on this map, and going southward from Louisville, the court will observe a branch leading off from Bardstown Junction southeastwardly via Bardstown to Springfield, on which are the stations, whose names and locations are shown in black or white, being the distillery points to which the Commission's reduced rates do or do not apply, according to the color given; that is, black showing they do apply, and white showing they do not, and the distances from Louisville are also shown as follows:

Names	Color	Miles from Louisville
Chapeze	Black	24
Clermont	Black	25
Hobbs	Black	27
Lotus	White	29
Deatsville	Black	31
Samuels	Black	33
Hunters	White	36
Bourbon	White	37
Nazareth	White	37
Withrow	White	38
Bardstown	Black	39
Early Times	Black	42
Greenbrier	Black	45

Thus, on this branch there are 13 stations, to 8 of which the Commission's reduced rates apply, and to 5 of which they do not.

Then, the court will notice going further southward on appellant's Main Stem line, another branch which leads off from that line at Lebanon Junction and runs southeastwardly via Lebanon to Greensburg, and adopting the same method as above, we have the following results, to-wit:

Names	Color	Miles from Louisville
Athertonville	White	44
Gethsemane	Black	48
New Hope	White	50
Willow Springs	White	51
Coon Hollow	Black	52
Dants	Black	53
Chicago	Black	55
Loretto	Black	57
St. Marys	Black	62
Lebanon	Black	67
Calvary	White	73
Campbellsville	White	87

On this branch there are 12 stations in all, to 7 of which the Commission's reduced rates apply, and to 5 of which they do not.

Following the Lebanon Branch on southeastwardly to Rowland and thence eastwardly on that line toward Richmond, the following four stations at which distillery plants are located will be found, and adopting the same method as above, the following results are shown, to-wit:

Names	Color	Miles from Louisville
Haden	White	107
Gilbert	White	110
Lancaster	White	113
Silver Creek	Black	129

Thus, there are 4 stations in all on this branch line, to only 1 of which the Commission's reduced rates apply, and to 3 of which they do not.

Then, on the Knoxville Branch, running southeastwardly from Rowland, is found Crab Orchard, marked in white, which is 115 miles from Louisville, and at which is located a distillery plant to which the Commission's reduced rates do not apply.

Now, returning to the Main Stem line and going southwardly to a point a few miles below Bowling Green, we have a station called Memphis Junction, which is 118 miles from Louisville, at which station there is located a distillery plant to which the Commission's reduced rates do not apply.

About 15 miles northeast of Bardstown will be found, colored in white, the station of Bloomfield, which is the southern terminus of the Bloomfield Branch, 58 miles from Louisville, where there is a distillery plant located, to which the Commission's reduced rates do not apply.

Taking the Lexington Branch from Louisville running first northeastwardly to LaGrange and thence eastwardly we find, colored in black, Eminence, 40 miles from Louisville, at which a distillery plant is located, to which the Commission's reduced rates are made to apply, although it does not appear that there was any complaint by the

distillery corporation doing business at that point or any one else of the existing rates thereto, in the proceeding before the Commission, and *complainant had no notice in that proceeding that the Commission would consider the question of rates to that point* (Exhibit C, Petition, Exhibit A therewith, and Answer in the Proceeding before the Commission, Tr. 31-35).

Of course, the order of the Commission reducing appellant's rates to Eminence is utterly void, even under the provisions of the McChord Act, the Commission being without any jurisdiction whatever in the premises.

Following the Lexington Branch on eastwardly from Eminence to a point a few miles east of Frankfort, we find a station, colored white, called Jett, 71 miles from Louisville, at which there is a distillery plant, to which the Commission's reduced rates are not made applicable.

Further eastward on the same line, and a few miles west of Lexington, is found a station marked in white, called Silver Springs, 88 miles from Louisville, at which there is a distillery plant located, to which the Commission's reduced rates do not apply.

The court is now asked to turn its attention to the line known as the Kentucky Division, having its northern terminus at Cincinnati, crossing the Ohio river there, connecting with Covington and Newport, Kentucky, on the south side of that river, and running thence southwardly through Paris, Winchester, and Richmond. On this line, before reaching Paris, it will be seen on the map that there are 13 stations, colored in white, at which distillery plants are located, but to none of which do the Commission's reduced rates apply. These stations, in the order in which they are reached going southward, and stating the distances from Covington, are as follows:

Names	Miles from Covington
Falmouth	38
Levingood	43
Morgan	46
Boyd	50
Berry	52
Robinson	55
Garnett	58
Poindexter	60
Kellers	62
Cynthiana	64
Lair	68
Shawhan	71
Kiserton	73

Strange to say, not one of the distillery corporations doing business at these 13 stations, within such close proximity to Covington and Newport, united, so far as this record discloses, in the complaint of the Greenbrier Distillery Company and others before the Commission, or made any complaint against appellant's existing rates from those two cities or from Louisville to either of said 13 stations.

But it does appear that the distillery corporations doing business at 3 other stations situated far away from Covington and Newport, complained of appellant's existing rates from those two cities, and the Commission's reduced rates were made applicable to said 3 stations distant from said points of origin as follows (Exhibit A, Tr. 26-27; Table with order of Commission, Tr. 28):

Names	Miles from Covington
Bardstown via Louisville	151
Coon Hollow " "	164
Silver Creek " Richmond	127

In addition to what has been stated above on the subject of the unjust discriminations and undue preferences between persons and localities which would be brought about by the enforcement of the Commission's one-way

rates on distillers' supplies, as set out in the order complained of, we call the court's attention to the affidavit of Traffic Manager Compton (clauses 3, 4, 5—Tr. 52-56), and to the affidavit of General Freight Agent Goodwyn (clause 5—Tr. 64). This testimony and the statements of the bill as amended, verified by Third Vice President Smith, on the same subject, were uncontradicted on the hearing of appellant's motion for an interlocutory injunction.

It seems plain and indisputable, therefore, that it is impossible for appellant to put the Commission's rates into force and effect without contravening both the letter and spirit of Sections 817 and 818, Kentucky Statutes, and for that reason, if for no other, said rates are manifestly unjust and unreasonable, and should have been enjoined by the court below. It is doubtless true appellant, by obeying the Commission's order fixing these reduced rates, would not be *wilfully* violating said sections of the Kentucky Statutes, or subjecting itself to the penalties prescribed in Section 819, but it is nevertheless true that unjust discriminations and undue preferences as between persons and localities would inevitably result, in the same manner and to the same extent, between persons and localities as if said discriminatory and preferential rates had been established voluntarily by appellant. The beneficent object of the law embodied in these sections would be effectually defeated by the action of the Commission's own order, if allowed to become effective, unless appellant should, to its great financial loss, annually apply these reduced rates uniformly, according to distances, upon all shipments of like commodities from the Ohio river cities to the other 32 distillery stations on its lines in Kentucky, although the distillers at those points, so far as this record discloses, have not complained of appellant's present rates applied to such commodities.

We submit that the Commission has no statutory power or authority to place appellant in that attitude, and its attempt to do so should not be allowed by a court of equity to become successful.

It was claimed by appellee's counsel in the court below, by way of meeting the averment and proof that the rates prescribed by the Commission operate to discriminate against shippers and other localities in the State, that Section 818, Kentucky Statutes, which was asserted to be the only statute in Kentucky prohibiting discrimination as between *localities*, had been declared void as to the penalties, because of its uncertainty, in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep. 491, and, therefore, complainant can safely await the further action of the Commission before it changes its other rates. Now, the section which prohibits unjust discrimination is Section 817, Kentucky Statutes, which has not been declared void in any case. Section 818 is framed against undue preferences, and Section 817 against unjust discriminations, and both are still in full force and effect, except as penal statutes. Certainly the Acts therein prohibited or declared to be unlawful, are against the public policy of the State, although not punishable as provided in Section 819. (99 Ky. 132.)

X.

THE RATE ORDER OF AUGUST 10, 1910, OF THE RAILROAD COMMISSION OF KENTUCKY WOULD, IF ENFORCED, DIRECTLY AND NECESSARILY AMOUNT TO AND OPERATE AS AN INTERFERENCE WITH AND REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID ON THAT ACCOUNT.

Errors assigned as XV, XVI, and XVII, will be discussed under this heading.

The Facts Bearing Upon This Proposition.

The facts which bear upon the proposition that the order of August 10, 1910, of the Railroad Commission of Kentucky, as reasonably interpreted, directly and by its necessary operation interferes with and amounts to a burden upon interstate commerce and operates as a regulation of commerce among the States, which facts are established by the uncontradicted allegations of the verified pleadings of appellant and by the supporting affidavits of C. B. Compton and D. M. Goodwyn, or of which this court will take judicial notice, are briefly stated as follows:

1. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate revenues and traffic.

2. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, destroy commercial relationships for many years existing between points in the State of

Kentucky and points outside of the State, and would create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

3. The order of the State Railroad Commission reducing appellant's intrastate rates, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

1.

In support of the first statement of fact, that the order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force interfere with and reduce appellant's interstate rates and interstate revenues, it is alleged by appellant in Paragraph XII of the original bill of complaint (Tr. 20 and 21) that the reduction in its rates ordered by the Commission would, if put into effect, directly, and necessarily interfere with, affect, and reduce appellant's existing rates on the commodities affected by the order to and from stations on its lines in Kentucky from and to stations on its lines outside of Kentucky; and that the order of the Commission, were it to become effective, would not only reduce appellant's local rates in Kentucky and cause an annual loss to appellant of at least $15,600.00, but would directly and necessarily result in reducing appellant's through rates on interstate shipments of such freight and cause an annual loss to appellant thereon of not less than $3,000.00, and that the change in rates and charges directed by the Commission in its order aforesaid would necessarily result in the disturbance, alteration, and re-

duction of interstate rates then and for a long time established on appellant's lines.

It is further alleged by appellant in Paragraph XX of its first amended bill (Tr. 81 and 82) that the enforcement of said order would compel appellant to accept upon interstate as well as upon intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, and which would not yield to appellant a fair or reasonable compensation for the service performed, and that the enforcement of the rates prescribed by said order would inflict upon appellant a direct annual loss of revenue and income to at least the extent of the sums stated in its original bill of complaint upon the transportation of both intrastate and interstate traffic in Kentucky, and a loss many times larger as the necessary result and consequence of putting into force and effect the rates in accordance with said order between the points named therein and between other points on its lines in Kentucky.

And in its second amended bill filed of record January 12, 1911, (Tr. 113) after setting forth certain rules and regulations of the Interstate Commerce Commission affecting the construction, filing and use of freight tariffs and classifications, appellant states (Tr. 118) the facts as to the application of its special rates on distillers' supplies to the 48 distillery stations at interior points in Kentucky prior to March 25, 1910, on both interstate and intrastate traffic, and the restoration of its standard rates thereon since that date as heretofore set out in this brief. It is further alleged a loss of $54,000 annually would be sustained by appellant, if compelled to apply the Commission's rates to the same commodities moving in both interstate and intrastate commerce to the forty-eight distillery stations in Kentucky.

It is a matter of universal knowledge in accordance with which all men conduct their daily affairs and regulate their lives that mankind will not pay more for a given service than it is required to pay. As set forth in the first amended bill in this case, (Tr. 115), the Interstate Commerce Commission considers a through rate or fare which is higher than the sum of the locals between the same points as prima facie unreasonable. The same principle is recognized by Congress in the fourth section of the Act to regulate commerce as amended June 18, 1910. As was said by Judge Trieber in the Arkansas Rate Cases, 187 Fed. 296, "if the States of Arkansas, Texas, and Missouri each enact a two cent rate fare, it would be folly for a carrier to attempt to charge a higher rate for interstate or transstate passengers in those States, for passengers would purchase tickets to the State line of each State at the reduced local rates and thus defeat the higher interstate rates, although the State rates are by the statutes of these States limited to intrastate transportation solely"; and, as indicated by Judge Trieber, the same rule applies to reshipments of freight. This Court has said (*Western Union Telegraph Co.* v *Kansas*, 216 U. S. 37):

> We cannot fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business.

The court below (Tr. 105) correctly inferred that with the reduction of the intrastate rate from Covington to Bardstown to $24.00 per car and the continuance of the present interstate rate from Cincinnati of $38.40 per car and the existence of a fair and reasonable charge for transporting the car from Cincinnati to Covington of, for ex-

ample, $5.00, all through shipments of cars from Cincinnati would cease unless the through rates were reduced to the combination which could be made with the intrastate rate from Covington. And this court will judicially notice that if the order of the Commission reducing appellant's intrastate rates were put in effect and appellant committed the folly of endeavoring to maintain its interstate rates from Cincinnati and other points outside of the State of Kentucky at amounts in excess of the combinations which could be made on intrastate rates from Covington and other points affected by the Commission's order, appellant's revenues on interstate traffic would, *nevertheless*, be reduced in consequence of the reshipping which would be practiced at Covington, Newport, and Louisville, and that, therefore, regardless of any action which appellant might take, the direct and necessary result of the enforcement of the order of the State Railroad Commission would be the curtailment or destruction of appellant's interstate traffic in the commodities affected, and the extinguishment or reduction of its interstate revenues with respect to such traffic.

2.

In support of the second statement of fact, that the order of the Commission reducing appellant's intrastate rates would, if put into effect, destroy commercial relationships for many years existing between points in the State of Kentucky and points outside of the State, and would create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and commerce of other States, it was alleged by appellant in Paragraph XX of its first amended bill (Tr. 82) that the enforcement of said order would compel appellant to charge and receive a less rate or compensation for the transportation of like kind of traffic in both intrastate and interstate, for a longer haul than for a shorter haul over

the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States against such discrimination.

And in its second amended bill filed January 12, 1911, (Tr. 113) after setting forth the provisions of Sections 2, 3, 4 and 6 of the Act to regulate commerce as amended, and certain rules and regulations of the Interstate Commerce Commission affecting the construction, filing, and use of freight tariffs and classifications, appellant averred (Tr. 116-118) that the City of Cincinnati, is situated on the north side of the Ohio river, which forms the State line between Ohio and Kentucky, and that appellant's rates from said city situated on the north side of said river, at the crossing thereof, to interior points in Kentucky were and had always been the same as or no higher than the rates from Covington or Newport, immediately opposite Cincinnati, on the south side of the Ohio river, to the same interior points in Kentucky on the same kinds of freight or commodities carried in the same quantities and under the same conditions; and that no difference was or had been made between the interstate rates and the intrastate rates of appellant from Cincinnati or from Covington or Newport to interior points in the State of Kentucky. And it averred that the immediate result of permitting the order of the Railroad Commission of Kentucky to go into effect would be an unjust discrimination against Cincinnati and all dealers in grain and other commodities used in the manufacture and shipment of whiskey located and doing business in that City, and they would thereby be subjected at once to an undue and unreasonable prejudice and disadvantage, and would have to pay the existing interstate rates on said commodities as set out in appellant's tariffs published and on file with the Interstate Commerce Commission; whereas like dealers doing busi-

ness just across the Ohio river, or State line, in Covington or Newport, Kentucky, under substantially similar circumstances and conditions, could and would ship the same commodities in the same quantities to the same interior distillery points in Kentucky on appellant's lines at the materially lower rates prescribed in said order, and would, therefore, receive an undue and unreasonable preference and advantage. Appellant averred that there existed no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order originating at Covington or Newport were or would be entitled to be transported to said distillery points at less rates than were in force on interstate shipments coming from without the State of Kentucky or from Cincinnati. And appellant further averred that what was true in this respect at the Cincinnati crossing of the Ohio river was likewise true in this respect at the Louisville crossing of the river.

With its said second amended bill, and as a part thereof, appellant filed a table marked "Statement No. 1," which was compiled from the existing official tariffs of appellant on file with the Railroad Commission of Kentucky and the Interstate Commerce Commission, and which illustrated what was stated with respect to appellant's rates applicable to interstate and intrastate shipments from the Cincinnati crossing of the Ohio river as compared with the Commission's rates from Covington and Newport, to the three interior points in Kentucky named in the order of August 10, 1910, on grain and other articles and commodities shipped in quantities as set out in said order, and which showed certain discriminations created by said order in favor of intrastate traffic and against interstate traffic passing through the Covington or Newport gateway or via the Cincinnati crossing of the river. That statement showed, for example, the following discriminations, for

which no reason existed, created by the order of the State Railroad Commission in favor of intrastate traffic from Covington and Newport, Kentucky, and against interstate traffic from the same points:

On barrel and box material, K. D., L. C. L., per 100 lbs., the rate to Bardstown, Kentucky, on interstate and intrastate traffic is 28 cents; the rate ordered by the State Commission on intrastate traffic is 23 cents, a discrimination, without reason, against the interstate traffic and in favor of the intrastate traffic of 5 cents per 100 lbs. The discrimination, without reason, on similar traffic to Coon Hollow, in favor of intrastate traffic and against interstate traffic, is 13.5 cents per 100 lbs. The existing rates from Covington and Newport, applicable alike on intrastate traffic and on interstate traffic on empty barrels, C. L., to Bardstown and Coon Hollow, were 16.8 cents and 20.4 cents per barrel, respectively; the rate ordered by the State Commission applicable on intrastate traffic is 14 cents per barrel in each case, resulting in a discrimination, without reason, in favor of intrastate traffic and against interstate traffic of 2.8 cents per barrel in the case of shipments to Bardstown, and of 6.4 cents per barrel in the case of shipments to Coon Hollow. And there is shown a further discrimination resulting from the fact that the existing C. L. rates on empty barrels applying alike to intrastate traffic and to interstate traffic are available only for shipments of a minimum weight of 10,000 lbs., or 166 2-3 barrels, while the rates ordered for intrastate traffic by the Commission are available for a minimum of 120 barrels. And similar discriminations, without reason or justification, in favor of intrastate traffic and against interstate traffic, from the same points, Covington and Newport, in connection with shipments to Bardstown, Coon Hollow and Silver Creek, are shown as follows: bottle caps, metal, any quantity, per 100 lbs., to Coon Hollow, interstate rate 50

cents; intrastate rate 37.5 cents; discrimination in favor of intrastate traffic and against interstate traffic 12.5 cents, or 25 per cent as measured by the interstate rate, or 33 1-3 per cent as measured by the intrastate rate. Bottle covers, paper or straw, packed or pressed in bales, C. L., per 100 lbs., to Bardstown, interstate 28 cents; intrastate 23 cents; amount of discrimination 5 cents per 100 lbs.: to Coon Hollow, interstate 34 cents; intrastate 20.5 cents; amount of discrimination 13.5 cents; and there is the further discrimination caused by the fact that in interstate traffic, in order to secure the C. L. rates, there must be a shipment of the minimum weight of 24,000 lbs., while on intrastate traffic, under the order of the Commission, C. L. rates are available for a shipment of the minimum weight of 15,000 lbs. On bottle covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs., the interstate rate to Bardstown is 32 cents; the intrastate rate prescribed by the State Commission, 29 cents, the unjust discrimination being 3 cents per 100 lbs.; and on shipments to Coon Hollow the rate on interstate traffic is 38 cents; the rate prescribed by the State Commission, 33 cents; and the discrimination 5 cents per 100 lbs. On bottles, common, packed, released, C. L., per 100 lbs., the interstate rates to Bardstown and Coon Hollow are 30 cents and 36 cents respectively; and the intrastate rates sought to be applied by the Commission, 25 cents and 23.5 cents, respectively, resulting in a discrimination of 5 cents per 100 lbs. and 12.5 cents per 100 lbs., respectively, in favor of intrastate traffic and against interstate traffic. On bottles, common, packed, released, L. C. L., per 100 lbs., the unjust and unreasonable discriminations per 100 lbs. in favor of intrastate traffic and against interstate traffic sought to be affected by the State Commission are, on shipments to Bardstown, Coon Hollow, and Silver Creek, 6.5 cents, 13.5 cents, and 6 cents. On shipment of boxes, empty, any quantity, per 100

lbs., the discriminations in favor of intrastate traffic and against interstate traffic amount, in some cases, to more than 100 per cent of the intrastate rates, the L. C. L. rates for interstate traffic to Bardstown, Coon Hollow, and Silver Creek, per 100 lbs., being, respectively, 49 cents, 57 cents, and 40 cents; and the rates sought to be made effective by the Commission being, respectively, 28 cents, 21.5 cents, and 19 cents; and the discriminations per 100 lbs. amounting, respectively, to 21 cents, 35.5 cents, and 21 cents. On shipments of corn, rye, malt, or barley, C. L., the rates applying on interstate traffic are 16 cents to Bardstown, 18 cents to Coon Hollow, and 13 cents to Silver Creek; the rates sought to be made effective by the Commission on intrastate traffic are 10 cents, 11 cents, and 10 cents, respectively; a discrimination of, without reason, respectively, 6 cents, 7 cents, and 3 cents per 100 lbs. On shipments of iron, hoop, C. L., to Coon Hollow, the rate applicable to interstate shipments is 29 cents per 100 lbs.; the rate sought to be applied by the State Commission on intrastate shipments is 17 cents per 100 lbs., an unjust and unreasonable discrimination of 12 cents per 100 lbs. And by the same statement unjust and unreasonable discriminations in favor of intrastate traffic from Covington and Newport, and against interstate traffic from Cincinnati, Ohio, (the rates from which Ohio point have always been made the same as or less than the rates from Covington and Newport, Kentucky) are shown as follows: On barrel material, K. D., L. C. L., per 100 lbs., to Coon Hollow, 9.5 cents; on barrels, empty, C. L., 4 cents per 100 lbs., with an advantage of a minimum of 120 barrels for intrastate traffic as against a minimum of 10,000 lbs., or 166 2-3 barrels, for interstate traffic; on bottle caps metal, any quantity, per 100 lbs., to Coon Hollow 8.5 cents; on bottle covers, paper or straw, packed or

pressed in bales, C. L., to Coon Hollow 9.5 cents per 100 lbs., with the further advantage in the application of intrastate rates on a minimum C. L. of 15,000 lbs., while C. L. rates cannot be secured on interstate traffic on a weight of less than 24,000 lbs.; on bottle covers, paper or straw, packed or pressed in bales, L. C. L., per 100 lbs., to Coon Hollow 3 cents; on bottles, common, packed, released, C. L., to Coon Hollow per 100 lbs., 8.5 cents; on bottles, common, packed, released, L. C. L., per 100 lbs., to Bardstown, 4.5 cents; to Coon Hollow 14.5 cents; to Silver Creek 6 cents; on boxes, empty, L. C. L., to Bardstown 21 cents per 100 lbs.; to Coon Hollow 31.5 cents per 100 lbs., to Silver Creek 21 cents per 100 lbs; on corn, rye, malt, or barley, C. L., per 100 lbs., to Bardstown 6 cents; to Coon Hollow 7 cents; to Silver Creek 3 cents. On iron, hoop, C. L., minimum 24,000 lbs., per 100 lbs., to Coon Hollow 12 cents. And it is apparent to any one that interstate shippers through Covington or Newport, or shippers from Cincinnati, could not, with the great discriminations in rates indicated (amounting, in some cases, to more than 100 per cent of the intrastate rates), hope to do business under the interstate rates in competition with the shippers who obtain the benefit of such intrastate rates from Covington and Newport.

With its said second amended bill, and as a part thereof, appellant also filed (Tr. 117) a table marked "Statement No. 2," compiled from the same sources, which showed appellant's rates on the same articles and commodities shipped in quantities set out in the Commission's order applicable to interstate and intrastate shipments from the Louisville crossing of the Ohio river as compared with the Commission's rates to the sixteen interior points in Kentucky named in said order, and which showed further discriminations created by said order in favor of intrastate traffic and against

interstate traffic. This statement shows discriminations in favor of intrastate traffic and against interstate traffic which would be caused by the enforcement of the order of the Commission with respect to shipments from Louisville, to the sundry distillery points named, varying from 1 cent per 100 lbs. to 30 cents per 100 lbs. For example, as shown by sheet number 3 of said table marked "Statement No. 2," the present rate on L. C. L. shipments of empty boxes applicable on both interstate traffic and intrastate traffic from Louisville to Lebanon, is 45 cents per 100 lbs.; the rate on empty boxes ordered by the Commission from Louisville, applicable on intrastate traffic is 15 cents per 100 lbs.; the resulting discrimination in favor of the intrastate traffic and against the interstate traffic is 30 cents per 100 lbs., or 200 per cent of the total rate sought to be enforced on intrastate traffic by the Commission. In other words, on the movement of this commodity from Louisville to Lebanon, the enforcement of the order of the Commission would create, without reason, such a discrimination against interstate traffic that the interstate shipper would have to pay three times as much as the intrastate shipper for the movement of the same quantity of a like kind of freight between the same points under the same circumstances and conditions.

With its said second amended bill, and as a part thereof, appellant also filed a table marked "Statement No. 3," compiled from the same sources, which shows appellant's rates from Cincinnati applicable on interstate traffic originating there, and also at points north of the Ohio river not on appellant's lines, as well as appellant's existing rates from Covington and Newport, applicable on intrastate traffic from the latter points proper, and also on interstate traffic originating at points north of the Ohio river not on appellant's lines, and the rates ordered by the Commission applicable on intrastate traffic from Covington

and Newport, all to certain distillery stations on appellant's lines in Kentucky, and appellant's existing rates to the same and to all other distillery stations on its lines in that State. This statement illustrates how the enforcement of the order of the Commission would necessarily cause discrimination against interstate traffic, either by reason of charging a greater compensation for the movement of that traffic than would be charged for the movement of intrastate traffic, under the same circumstances and conditions, or, if this were attempted to be avoided, by reducing the interstate rates to the level of the intrastate rates by charging on interstate traffic a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

For example, Gethsemane, New Hope, Willow Springs, and Coon Hollow, are stations situated upon the Lebanon Branch of appellant's line of railroad, respectively 156, 158, 159, and 160 miles from the river crossing at Cincinnati, Newport, and Covington. The shortest route from Cincinnati, Newport, and Covington to these stations is via Louisville, and Lebanon Junction, and via this route Gethsemane, New Hope, and Willow Springs are all intermediate to Coon Hollow; and property carried from Cincinnati, Covington, or Newport to Gethsemane, New Hope, or Willow Springs would be transported over the same line or route in the same direction for a shorter distance than property carried from the same points to Coon Hollow, and the shorter would be included within the longer distance. The rates on barrel and box material, K. D., L. C. L., per 100 lbs., applicable on both interstate traffic and on intrastate traffic from Covington and Newport, to these four stations are the same, 34 cents per 100 lbs., and the rates from

Cincinnati, on this commodity are 30 cents per 100 lbs. to Willow Springs and Coon Hollow, and 29 cents per 100 lbs. to the intermediate stations, Gethsemane and New Hope. The rate ordered by the Commission from Covington and Newport, Kentucky, applicable in intrastate traffic on box and barrel material, K. D., L. C. L., per 100 lbs., to Coon Hollow, is 20.5 cents. If the order of the Commission were put into effect, and the rate of 34 cents now applicable on this commodity on interstate traffic from Covington and Newport to Coon Hollow, is not reduced, there would necessarily result an unreasonable and unjust discrimination against the interstate traffic of 13.5 cents per 100 lbs.; and if the interstate rate from Covington and Newport, on this commodity to Coon Hollow were reduced to the rate ordered applicable on intrastate traffic by the Commission, 20.5 cents, there would result on interstate traffic to the intermediate points, Gethsemane, New Hope, and Willow Springs, a discrimination of 13.5 cents per 100 lbs., which is prohibited by Section 4 of the Act to regulate commerce as amended June 18, 1910. And in a similar way, either the rate of 30 cents from Cincinnati to Coon Hollow must remain, and, as compared with the intrastate rate of 20.5 cents from Covington and Newport, constitutes an unreasonable discrimination of 9.5 cents per 100 lbs. against interstate traffic, or, if the rate from Cincinnati is reduced to the level of the intrastate rate, there will result a discrimination prohibited by the long and short haul clause of the fourth section of the Act to regulate commerce as amended, amounting to 8.5 cents per 100 lbs. in the case of the intermediate points, Gethsemane and New Hope, and of 9.5 cents per 100 lbs. in the case of the intermediate point, Willow Springs. If it should be supposed that traffic from Covington, Newport, or Cincinnati might reach Coon Hollow, via Livingston or Rowland, junctions of a possible

line from Cincinnati with the Lebanon Branch, in an opposite direction from Lebanon Junction, such supposition would not change the results, because on traffic so moving Dants, Chicago and Loretto, would be stations on the Lebanon Branch intermediate between Cincinnati, Covington, and Newport on the one hand, and Coon Hollow on the other; and, as is shown by table marked "Statement No. 3," the unjust discriminations with respect to traffic to Dants, Chicago, and Loretto would be as great as or greater than the discriminations which have been illustrated with reference to Gethsemane, New Hope, and Willow Springs. Gilbert, which is shown in the list of distillery stations in table marked "Statement No. 3," is a station in Lincoln County, Kentucky, on the Richmond Branch of the Kentucky Division of appellant's line of railroad, and is not on the same branch as Withrow and Bardstown, stations which are shown contiguously in the list. Bloomfield is a station in Nelson County on the Bloomfield Branch of appellant's line, and Lancaster is a station in Garrard County on the Richmond Branch of the Kentucky Division of appellant's line. Chapeze, Clermont, Hobbs, Lotus, Deatsville, Samuels, Hunters, Nazareth, Bourbon, Withrow, and Bardstown, are stations on the Bardstown Branch of appellant's line which can only be reached via Bardstown Junction; and on shipments from Cincinnati, Covington, or Newport, Chapeze, Clermont, Hobbs, Lotus, Deatsville, Samuels, Hunters, Nazareth, Bourbon and Withrow are intermediate on the same line to Bardstown. As is shown on sheet 4 of table marked "Statement No. 3," the rates from Cincinnati, and from Covington and Newport, applicable alike on interstate traffic and on intrastate traffic on bottles, common, packed, released, L. C. L., are to Chapeze, Clermont and Hobbs, 34 cents per 100 lbs., and to Lotus, Deatsville, Samuels, Bloomfield, Hunters, Nazareth, Bour-

bon, Withrow and Bardstown, 37 cents per 100 lbs. The rate ordered by the Commission on this commodity from Covington and Newport, applicable on intrastate traffic to Bardstown is 31.5 cents per 100 lbs. In the explanation just given with respect to rates on box and barrel material to Coon Hollow, it is evident that if the order of the Commission is put into effect either the rates to Bardstown on interstate traffic must remain at the present figures, resulting in an unreasonable and unjust discrimination of 5.5 cents per 100 lbs. in favor of intrastate traffic and against interstate traffic, or, if the interstate rates to Bardstown are reduced to a level with the intrastate rates, such action will result in an unlawful discrimination of 2.5 cents per 100 lbs. against interstate shipments to Chapeze, Clermont, and Hobbs, and of 5.5 cents per 100 lbs. to Lotus, Deatsville, Samuels, Hunters, Nazareth, Bourbon, and Withrow, in violation of the long and short haul clause of the fourth section of the Act to regulate commerce as amended by the Mann-Elkins Act of June 18, 1910.

Similar conditions with respect to traffic from Louisville, are shown by table marked "Statement No. 4," which was also filed (Tr. 117) as part of appellant's second amended bill.

The affidavit of C. B. Compton (Tr. 45) also shows that the order of the Commission reducing appellant's rates would, if put into effect, create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States; and as illustrative of some of the discriminations that would arise from the enforcement of said order, includes a statement (Tr. 55) showing certain rates on corn, rye, malt and barley from Louisville, which would have to be established,

both intrastate and interstate, to prevent unjust discriminations and violations of the long and short haul principle.

3.

In support of the third statement of fact, that the order of the Commission reducing appellant's intrastate rates, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States, it is averred by appellant in Paragraph XX of its first amended bill, filed November 3, 1910, (Tr. 80-82) that the maximum rates prescribed by the Commission in its order of August 10, 1910, herein complained of, upon corn, rye, malt, barley and other articles used in the manufacture and shipment of whiskey, on and over appellant's lines from Louisville, Covington, and Newport, respectively, to the sixteen stations, respectively, named and set out in the said order, are arbitrary, unjust, unreasonable, discriminatory, and illegal, because of, among other grounds, facts which were alleged to exist, as follows:

(a). The enforcement of the rates prescribed in said order would bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points in other States and transported between the same points in Kentucky, or it would result in the application of said reduced rates, without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.

(b). The said order, if enforced, would compel appellant to charge materially less rates in one direction than in the other direction between the same points on both intrastate and interstate traffic of the

same kind, or else to apply said specially low rates, without distinction or discrimination, in both directions between all points.

(c). The said order, if enforced, would require appellant to charge less rates upon corn, rye, malt and barley than upon wheat, oats, and other kinds of grain, whereas it has always endeavored to charge and collect the same rates upon all kinds of grain; or it would result that appellant would be compelled to apply the rates specified in said order to all kinds of grain upon both intrastate and interstate shipments.

(d). The said order, if enforced, would compel appellant to charge and collect less rates per 100 lbs. upon carload quantities than less than carload quantities of grain, whereas appellant has always endeavored to charge and collect the same rate upon carload as upon less than carload quantities of grain; or it would result in appellant being compelled to establish less rates for carloads than for less than carload quantities of grain upon both intrastate and interstate traffic.

And in its second amended bill (Tr. 119) it is further averred by appellant that a large volume of interstate traffic in corn, rye, barley, malt and other distillers' supplies, is constantly moving from points north and west of the Ohio river through Covington and Newport to the distillery stations named in the said order of August 10, 1910, as well as to the thirty-two other distillery stations on appellant's lines in Kentucky; and in each case the *through* rate charged and collected thereon from points north and west and beyond Cincinnati is and had been the same as the rate from those points of origin to the Ohio river, plus the rate south of the river. And it is further averred that the direct, immediate, and necessary operation and effect of the putting into force of the intrastate rates on the commodities prescribed in the order of August 10, 1910, would be to compel appellant, unless it surrendered its right to transact such interstate commerce business and to give it up entirely, to do one of two things, to-wit:

Either, on the one hand, to change and reduce its existing rates (which are just and reasonable and covered by its tariffs on file with the Interstate Commerce Commission) on interstate shipments of like commodities originating at Cincinnati and other points outside of Kentucky, north and west of the Ohio river, and entering that State at the Cincinnati or Louisville crossing of the Ohio river, destined to the points named in said order; or

On the other hand, to continue its said rates on interstate shipments in full force and effect, without change or reduction, leaving them materially and substantially higher on the same commodities shipped from Cincinnati and other points outside of Kentucky for the same distances in Kentucky, or on the south side of the Ohio river, to the same destinations named in said order, thus creating unjust discriminations against shippers of such traffic in interstate commerce by charging, demanding, collecting, and receiving from them a greater compensation for the services rendered in the transportation of property than it charges, demands, collects, or receives from other shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, as well as giving undue and unreasonable preferences or advantages to the shippers of such traffic in intrastate commerce in Kentucky, and subjecting shippers of the same class of traffic to the same destinations from Cincinnati and localities north and west of the Ohio river and other points outside of the State of Kentucky, to undue and unreasonable prejudice and disadvantage in said respects.

And in either event, as has been stated, and as is fully apparent, the revenues of appellant would annually be diminished to a large extent. And appellant, in said second amended bill, further averred that the said order of August 10, 1910, was illegal and void because it thus substantially interfered with, burdened, and regulated interstate commerce, and hampered the enforcement of the Act to regulate commerce, and compelled appellant to abandon or surrender the rights which

it had, under the Constitution and laws of the United States, and would prevent it from enjoying its rights and powers under said Constitution and laws in the transportation of interstate traffic.

THE OPINION OF THE LOWER COURT.

The Circuit Court in its statement of inferred facts (Tr. 105) considers only that phase of the question which relates to reductions of interstate rates caused by combination with reduced intrastate rates, and, with respect to this aspect, holds that the election of the company to change the rates forced by commercial necessity is an independent intervening cause, and the effect is the indirect and not the direct result of a due exercise of the universally recognized police power residing in the State to reduce its intrastate rates.

The lower Court does not consider the question of discrimination against interstate traffic which is raised in the pleadings, except to remark that the railroad company will not be held responsible for such discrimination. The question as to whether or not the Interstate Commerce Commission will hold the railroad company responsible for such discrimination is entirely beside the point. The discrimination which the enforcement of the order of the State Commission would necessarily cause against interstate traffic and against the persons engaged in interstate traffic as compared with the persons engaged in intrastate traffic is in itself an interference with interstate commerce, regardless of the question as to whether the Interstate Commerce Commission will hold the carrier responsible for the creation of conditions admittedly beyond its control.

The Circuit Court said (Tr. 106) that if it could be rightly concluded that putting the new rates into effect would operate as a direct interference with and regulation of interstate commerce, it needs no argument to show that

such enforcement would be violative of the Federal commerce clause, but

> 1. That the averments in this behalf of the bill as amended are made up rather of conclusions of counsel than of definite statements of fact; and
> 2. That there exists an election on the part of the company to change or not to change the interstate rates, which constitutes an independent intervening cause and renders the change an indirect and not a direct result of the Commission's order.

We submit that the Court below erred with respect to both of these points. In the case of Southern Railway v. King, referred to in the opinion, it was said by this Court (p. 533), after citation of numerous cases, that "applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their *effect* upon interstate commerce" and in passing upon the sufficiency of the averment of facts which has been made by the plaintiff in error, this Court said (p. 536):

> The Circuit Court of Appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and, therefore, deprive the railway company of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful

operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense and that the demurrer thereto was properly sustained.

Mr. Justice Holmes, with whom Mr. Justice White concurred, vigorously dissented, and said (pp. 537-538):

The petitioner set up as a defense to these actions that the statute under which it was sued was such a burden on commerce among the States as to violate Sec. 8, Art. 1, of the Constitution of the United States—a pure issue of law. If in order to try this issue intelligently it was necessary to take evidence of facts, I think the Court was bound to hear such evidence, even without any specific allegation of the facts that would maintain it, as it is the Court's duty to know and to declare the law. But I leave that question on one side because the petitioners did not stop with the naked proposition, but alleged further that "it is impossible to observe said statute and carry the mails as the defendant is required to carry them under the contract it has with the Government; and it is likewise impossible to do an interstate business, and at the same time comply with the terms of said statute." These are pure allegations of fact. They mean on their face that the requirements that the engineer at every grade crossing should have his train under such control as to be able to stop if necessary to avoid running down a man or wagon crossing the track requires such delays as to prevent or seriously to interfere with commerce among the States. They refer to physical conditions and to physical facts; they can refer to nothing else. I think it obvious that they mean that the crossings are so numerous as to make the requirement imprac-

ticable, since I can think of nothing but the number of them that would have that effect.

The statement may be called a conclusion, but it is a conclusion of fact, just as the statement that a certain liquid was beer is a conclusion of fact from certain impressions of taste, smell and sight. If the objection to the pleading had been that more particulars were wanted, although, for my part, I think it would have been unnecessarily detailed and prolix pleading to set forth what and where the crossings were, the pleading should not have been rejected, but the details should have been required.

But even if the averments made by the Southern Railway Company in that case were not sufficient, it is plain that the averments made by appellant in this case cover all of the points which it was suggested by the majority of the court in the King case should have been set forth. In the King case it was complained that the averments did not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. In this case, as has been fully set forth in the discussion of the statements of fact, appellant showed the effect of the Commission's order as to traffic from all of the forwarding stations covered by the order, Louisville, Covington, and Newport, and as to all of the sixteen points of destination covered by the order, and showed, as well, the effect as to Cincinnati and other points outside of the State of Kentucky as compared with Louisville, Covington, and Newport, and besides showed the effect on shipments to thirty-two other distillery stations in Kentucky not included in the order of the Commission; and appellant further showed the minimum effect in dollars and cents on its revenues and traffic, interstate and intrastate separately, and comparisons were made and facts stated as to business of the sixteen distillery stations covered by the Commission's order and business

of the thirty-two distillery stations not covered by the order. In the former case it was said by the court:

> For aught that appears as allegations of fact in this answer, the crossings at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway.

In Paragraph XX of its first amended bill appellant set forth that the enforcement of the State Commission's order would compel appellant to charge and receive a less rate or compensation for the transportation of like kind in both interstate and intrastate traffic for a longer haul than for a shorter haul over the same line in the same direction, and tables included in the pleadings and in the affidavits of C. B. Compton and D. M. Goodwyn showed the details and particulars of this discrimination.

In its second amended bill (filed, as heretofore shown, at the suggestion of the court below after rendition of its opinion), appellant averred that there existed no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order originating at Covington or Newport were or would be entitled to be transported to said distillery points at less rates than were in force and covered on interstate shipments coming from without the State of Kentucky or from Cincinnati; and appellant further averred that what was true in this respect at the Cincinnati crossing of the Ohio river was likewise true in this respect at the Louisville crossing of the river. And appellant filed as part of its second amended bill tables marked "Statement No. 1," "Statement No. 2," "Statement No. 3," and "Statement No. 4," which set out not only the facts averred, but evidence of the facts.

In *Gates* v. *Haw*, 150 Ind. 370, citing Webster, a fact is defined as an effect produced or achieved. It is elementary that there are two kinds or classes of facts—evidentiary facts, and ultimate, main, or principal facts. Good pleading demands a statement of ultimate facts only, but it is submitted that in this case appellant has not only pleaded such facts, but has also given evidence of those facts. The facts necessary to be averred in this case in order to show that the effect of the order of the State Commission, if enforced, would be unlawfully to regulate interstate commerce have been properly averred, and they have further been proved conclusively by the testimony of experts, C. B. Compton and D. M. Goodwyn, which is uncontradicted in the pleadings or in the proof; and this court has held (*C. M. & St. P.* v. *Tompkins*, 176 U. S. 167, 178) that in such matters the testimony of experts is not to be disregarded.

The reasoning of the court below with reference to the election supposed to exist on the part of the company to change or not to change the interstate rates is unsound, for it suggests a dilemma either horn of which would result in an interference with interstate commerce. If the company yields to the inexorable law of trade and reduces its interstate rates, interstate commerce is subjected to interference and restraint by the reduction of interstate rates and by the loss of company's revenue on interstate commerce. If the company does not yield to the inexorable law of trade, interstate commerce is interfered with and restrained because it is discriminated against by lower rates on State commerce moving under substantially similar circumstances and conditions, and because the business will not move as interstate commerce when lower rates can be obtained by re-shipping at the river crossing, and moving it from the State line as

intrastate traffic, and interstate commerce is therefore destroyed.

The fact should be readily apparent even to a layman that the public will not ship at a higher rate in interstate commerce when it can secure lower through rates by reshipping at a reduced intrastate rate. But even if this compulsive necessity for reducing interstate rates to a parity with intrastate rates were not otherwise fully apparent, it is directly testified to by the experts Compton and Goodwyn in their affidavits.

Furthermore, as is shown by the pleadings, the Interstate Commerce Commission has said that a through rate in excess of the combination of locals is unreasonable, and it is apparent that such higher through rate on interstate traffic would be reduced as a matter of law on complaint of an interstate shipper to the Interstate Commerce Commission. The Interstate Commerce Commission has heretofore hesitated to take action in cases of discrimination where the reduced rates were forced upon the carriers by State authority, although holding the discrimination to exist (*Saunders* v. *Southern Express Company*, 18 I. C. C. 415). But the Interstate Commerce Commission has recently ruled that it will not, with respect to passenger rates, grant relief beyond May, 1912, from the prohibition of the fourth section of the Act to Regulate Commerce against through rates in excess of intermediate rates where the intermediate rates have been reduced by State action. Reference in this connection is made to various orders of the Interstate Commerce Commission issued under the fourth section of the Act to Regulate Commerce as amended June 18, 1910, particularly to Fourth Section, Order No. 89, with reference to the ticket rates of the Louisville & Nashville Railroad Company.

The Circuit Court held that there is no showing that the reduced rates prescribed by the Commission are con-

fiscatory, and its order is based upon the finding that the rates are not confiscatory. Assuming, for the sake of argument, that the finding of the court in this respect is correct, then on the movement of interstate freight under the rates prescribed in the Commission's order there would be some profit, even if that profit is not adequate, and the loss of the entire interstate business would, therefore, amount to more than the loss caused by a reduction of interstate rates to a parity with the reduced intrastate rates. In other words, the loss of the entire business will be greater than the loss caused by the reduction in rates. And, therefore, the carrier must either reduce its interstate rates to the level of the intrastate rates, or it must forego entirely the interstate business and suffer even greater loss. Clearly, there is no election such as suggested by the court. Surely such conditions are compulsive, and there is no escaping the conclusion that the direct and necessary effect of the order of the Commission is to interfere with, burden, and regulate interstate commerce.

Under the natural laws of trade, the State of Kentucky might just as well lay a tax on every car of traffic from Cincinnati or Jeffersonville, or other points outside of the State of Kentucky, destined to the Kentucky points named in the Commission's order (as the State of New York, before the adoption of the Constitution, levied a tax on shallops carrying vegetables and fruits from New Jersey, and wood boats bringing firewood from Connecticut) as to reduce intrastate rates so intimately connected with interstate rates as those in the present case.

It is impossible to conceive how the court in pursuance of any legal principles has arrived at the conclusion that even the voluntary (if it were voluntary) act of the carrier in choosing what appears to it the lesser of two evils could constitute an independent intervening cause. As

shown in Words and Phrases Judicially Defined, Volume No. 4, with reference to the definition of "intervening agency," and upon the strength of authorities there cited, intervening agencies, in order to interrupt the current of responsible connection, must entirely supersede the original culpable act and be in themselves responsible for the injuries, and must be of such a character that they could not have been foreseen or anticipated by the wrongdoer. The principle is clearly stated by Melville M. Bigelow, in Paragraph 98, seventh edition, of his work on Torts, in discussing the maxim "*causa proxima, non remota, spectatur.*" With citation to the famous Squib case, *Scott* v. *Shepherd*, 2 W. Black. 892, Mr. Bigelow says:

> With reference to this maxim, nothing could be more misleading than to take it in its plain, primary sense; in that sense the law as often regards the 'remote' and disregards the proximate cause, as it does the contrary. A tosses a lighted squib into one of the booths of a market, and B, the owner of the booth, instinctively throws it out and it falls into the booth of C, who repeats the instinctive act, but now the squib strikes D in the face and puts out his eye. C obviously is nearest, or 'proximate' in the primary sense, to D, and A is most 'remote' of all; and yet A is liable to D, and C probably is not; A is liable whether C is or is not, supposing that C has acted instinctively and not of purpose, negligence, or other wrongful conduct towards D. It is obvious that the maxim is to be taken in some metaphysical sense; B and C must be regarded as machines, and the final result as happening in the natural course of things.

A similar situation arises in those cases wherein a person injured by another places himself in the care of a physician and does not recover from the injury, or the effects of the injury are greater because of a mistake of the physician. In such cases, of course the mistake of the physician is not considered as the primary, proximate, or direct cause of the injury. If the traffic manager, the

business physician of the railroad company, advises that the interstate rates must be cut to the level of the reduced intrastate rates in order to save what remains of the possibilities of interstate traffic, the railroad company would take his advice, just as the patient injured by another takes the advice of his physician. If the person injured by the wrongful act of another does not consult a physician, he suffers damage from the wrongful act; and if he does consult a physician, and the physician is unable to cure, or even intensifies the damage, the damage done is that effected by the original wrongdoer. The original wrongdoer in this case is the Railroad Commission of the State of Kentucky; and damage is sought to be done by that Commission to appellant by a wrongful act, which is in violation of the commerce clause of the Constitution of the United States.

There is no magic in the words "police power" used by the court below in its opinion (Tr. 106). The police power of a State is nothing more than the power of the State, the power of sovereignty, the power to govern men. If a State is forbidden by the Constitution to govern, or to legislate, or to regulate as to certain matters, it cannot so govern, legislate, or regulate by claiming that its action is an exercise of "the universally recognized police power residing in the State."

The prohibition against State interference with interstate commerce is found in the Constitution of the United States, and not merely in the enactment of the Act to Regulate Commerce; and the interference with interstate commerce caused by the Commission's order in this case exists regardless of the question as to whether or not, under the Act to Regulate Commerce, the Interstate Commerce Commission would hold a carrier responsible for the discrimination against and interference with interstate commerce caused by the order of the State Commission. In the *Saunders Fish Case*, 18 I. C. R. 415, referred to in

the opinion, the Commission suggested the necessity for Congressional control of rates exacted on State traffic by interstate carriers, but refrained from a regulation of such rates simply because the act under which it (the Commission) received its authority expressly excluded intrastate traffic from its jurisdiction. The commerce clause of the Constitution of the United States is not subject to such limitations.

With reference to the *Hope Cotton Oil case*, 12 I. C. R. 265, cited in the opinion of the court below, it is to be noted that, although the Interstate Commerce Commission may not have regarded the State rate as binding as a necessary measure of the interstate rate, they nevertheless did, in the *Hope Cotton Oil case*, base the interstate rate on the intrastate rate; and since that case was decided Congress has affirmatively provided in the fourth section of the Act to Regulate Commerce as amended that it shall be unlawful to charge any greater compensation on a through route than the aggregate of intermediate rates subject to the provisions of the Act.

The Circuit Court misconceives the proposition as to discrimination. That proposition is not that the railroad company would be punished for discrimination which it is forced by the order of the State Commission to inflict, but the proposition is that the order of the State Commission, if enforced, would itself, and by its necessary operation, constitute a discrimination against, and therefore a burden upon and interference with, and a regulation of interstate commerce. Sections 817 and 818 of the Kentucky Statutes (Tr. 120) and Sections 2, 3 and 4 of the Act to Regulate Commerce all provide against unjust discrimination, against the making or giving of undue or unreasonable preferences or advantages, and against creating undue or unreasonable prejudice or disadvantage. It will not be denied that the statutes of the State act

upon and prevent such discriminations between State rates, and it will not be denied that Sections 2, 3 and 4 of the Act to Regulate Commerce act upon and prevent such discriminations in interstate rates. But it is said by the court that it is provided in the Act to Regulate Commerce that the Act shall not apply to the transportation of passengers or property wholly within any State and not shipped to or from a foreign country from or to any State of territory. Can it be conceived that there is no power to prevent discrimination by an interstate rate against an intrastate rate, or discrimination by an intrastate rate against an interstate rate? The reasoning of the court below would lead to this conclusion. The State could not adjust such discrimination because it would amount to a regulation of interstate commerce, and the Nation could not adjust such discrimination because, indeed, a proviso of the Act to Regulate Commerce excludes from the operation of that Act the receiving, delivering, storage, and handling of property wholly within one State and not shipped to or from a foreign country from or to any State or territory. Such a result would be intolerable, and the fallacy is of course due to the measurement of the power of the Nation by the act of Congress instead of by the Constitution of the United States. The power granted by the commerce clause is ample, and in accordance with that clause the Nation, and the Nation alone, can prevent discriminations between interstate rates and intrastate rates. This court has held in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 101:

> There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of such law enacted by Congress separate and distinct from the body of such law enacted by the several States. But it is an entirely different thing to hold that there

> is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

And in the opinion of this court in that case, at page 100, it was reiterated that "this court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States; it has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free." It is clear that that common law which is enforced generally throughout the United States, and which governs the countless multitude of commercial transactions "among" the States, forbids discrimination either between interstate rates or between intrastate rates and interstate rates. It is clear that the power to prevent such discrimination resides to its full extent in the national authority, and is given to the Nation by the commerce clause of the Federal Constitution. And it is likewise clear that any discrimination in violation of that body of common law caused by the act of a State Railroad Commission is an interference with, and burden upon, and amounts to a regulation of, commerce "among" the States, and is unconstitutional and void.

The lower court's recital (Tr. 107) of what is claimed, falls far short of the complete statement of our case in this regard, as we shall hereinafter show in a re-statement of our proposition.

The lower court holds that the averments, that the company will make a reduction of its interstate rates to correspond with the rates in dispute, states nothing more than that it will do this for strictly business reasons. It is respectfully submitted that in this statement the lower court erred if, by a reference to changes for strictly business reasons, it meant that the interstate rates would be

reduced as an entirely voluntary act of the carrier. If by strictly business reasons, the lower court referred to the reasons *necessitating* the reduction of rates, it seems that it makes no difference how you denominate the reasons, provided those reasons are potent and compulsory. The question is not whether a business or economic *policy* of a railroad, as distinguished from a legal duty, to change its existing rates to correspond with just and reasonable rates imposed by the State body, is said to be a direct and not merely an indirect effect of the State's action. The interstate rates would be changed by the railroad company, not as a matter of *policy*, but as a matter of *necessity*. "In determining whether a statute does or does not burden interstate commerce, the court will look beyond mere form and consider the substance of things," *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 2.

In the same case this court said:

> But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show.

(Ib. p. 27.)

We cannot fail to recognize the intimate connection which, at this day, exists between the interstate

> business done by interstate companies and the local business which, for the convenience of the people must be done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the supreme law of the land.
>
> (Ib. p. 37.)

We submit that it is a mistake to say, as stated in the opinion of the lower court, the logic of the company's argument would release its local rates from governmental regulation altogether by reason of the fact that the United States could not fix local rates, because they are local, and the State could not change them, because it would thereby cast a direct burden on interstate commerce. It seems that the confusion of the lower court in this regard results from its lack of accurate definition or delimitation of the respective spheres of Congress and the States in the matter of commerce. Throughout its opinion the lower court has assumed the authority of Congress to be exclusive over interstate traffic, and over interstate traffic only; and has assumed the authority of the State to be exclusive over intrastate traffic. This assumption is entirely erroneous. Profitable argumentation of the question demands a more accurate definition of the general principles governing the spheres of influence or powers which we are discussing, and that accurate definition can readily be obtained from decisions of the courts in cases in which the precise question has been raised.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheaton 1, which is referred to in the opinion of the lower court (Tr. 108), it is to be noted that Chief Justice Marshall did not limit the power of Congress to the regulation of interstate rates and did not assert that the State had exclusive power over intrastate traffic; but what the great Chief Justice did say was (p. 194):

> The word "among" means intermingled with; a thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is *completely internal*, which is carried on between man and man in a State or between different parts of the same State, *and which does not extend to or affect other States.* * * * * Comprehensive as the word "among" is, it may very properly be restricted to that commerce *which concerns more States* than one. (Italics are ours.)

The commerce reserved to the States (9 Wheaton 195), is only that completely internal commerce which does not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. Chief Justice Marshall further said in that case, (p. 196):

> The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. * * * * We are now arrived at the inquiry—What is this power? It is the power to regulate, that is to prescribe, the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Chief Justice Marshall said that the power was the power to prescribe the rule by which *commerce*, not interstate commerce, is to be governed; that the power is com-

plete in itself, and may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution.

There is no dispute as to the exclusive control of Congress over interstate commerce.

The definition of the respective powers of State and Nation, with respect to intrastate commerce, is most clearly given in the recent case of *Shepard* v. *Northern Pacific Railway Company*, 184 Fed. 765, in which Judge Sanborn said (page 770):

> To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce, the Nation, by its Congress and its courts, may affect and regulate intrastate commerce, but no farther.
>
> To the extent that it does not substantially burden or regulate interstate commerce, a State may regulate the intrastate commerce within its borders, but no farther.

It may be freely granted that the regulation of the completely internal commerce of a State is reserved to that State, but it must be as freely recognized that the completely internal commerce of the State is only that which does not extend to or *affect* other States, and as was further said by Judge Sanborn, (184 Fed. at page 770), upon the authority of numerous cases cited by him:

> If the plenary power of the Nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way because the Constitution and the Acts of Congress passed in pursuance thereof are the supreme law of the land, and that which is not supreme must yield to that which is supreme.

It is clear, therefore, that the logic of the company's argument would not release local rates from governmental regulation altogether.

We have shown above, in the discussion of the question of discrimination, that the unavoidable result of the reasoning of the lower court would be to release from governmental control all unjust and unreasonable discriminations between interstate rates and intrastate rates, or between those engaged in interstate commerce and those engaged in intrastate commerce. The logic of the company's argument would place under the control of Congress all such matters in which the plenary power of the Nation to protect the freedom of and to regulate commerce, and the attempted exercise by the State of its power to regulate intrastate commerce impinge or conflict. The company's argument in this connection is in entire accord with the doctrine repeatedly laid down by this court, that where the subject of commerce is national in its character and demands uniformity of regulation, Congress alone can legislate, and when Congress has not legislated, it necessarily follows that that subject is to be free from all legislation whatever.

The cases in 118 U. S. 557, 565; 134 U. S. 418, 459; 193 U. S. 197, 350, cited in the opinion of the lower court (Tr. 108) do not in any wise alter the definition and principle which have been stated. What Justice Miller said in *Wabash, etc. Ry. Co.* v. *Illinois* 118 U. S. 557, 565, was simply that there is a commerce wholly within the State which is not subject to the constitutional provision, and that we may freely grant. Justice Miller did not say that the commerce so referred to is synonymous with intrastate commerce as that term is generally understood. On the contrary Justice Miller said (at p. 565) that it is not always easy where the lines of the different classes approach each other to distinguish between the one and the other. The commerce to which Mr. Justice Miller referred to in *Chicago etc. Railway Co.* v. *Minnesota*, 134 U. S. 418-459, was "the business of

common carriers limited to points within a single State." This class does not embrace the intrastate traffic of the State which is not limited to points within that State, but which extends to and affects points in other States. The language of Mr. Justice Harlan in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 350, referred to by the lower court, establishes the exact contrary of the position which it is cited to maintain. Mr. Justice Harlan there said:

> Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not permitted by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations or any combination of its citizens with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress.

The reference made by the lower court to the Employers Liability cases, 207 U. S. 463, is merely in reiteration of the principles announced in *Gibbons* v. *Ogden*, which we have discussed, and which, as we have shown, do not in any way conflict with our proposition, but, in fact, support it and assist in its demonstration.

We submit that the lower court errs in stating (Tr. 108-109) the *ratio decidendi* of *Louisville & Nashville Railroad Company* v. *Eubank*, 184, U. S. 27. The action of the Commission in that case did not fail because it attempted to employ an interstate rate as a standard for determining whether a local rate between points within Kentucky, over the same road as that over which the interstate rate prevailed was a violation of the State's long and short haul statute.

The statement of Mr. Justice Peckham, with reference to an enactment by Congress, that an interstate rate should be the sum of local rates prescribed by the several States, which is cited by the lower court (Tr. 109), relates only to the contention raised in the argument that such action would amount to an interference with the power of the State over local rates. It does not in any way relate to, and the learned Justice who delivered the opinion did not consider, the question of interference with interstate rates by the State's action. In that same case (at page 36), Mr. Justice Peckham said:

> We fully recognize the rule that the effect of a State constitutional provision, or of any State legislation, upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident.

And that statement of Mr. Justice Peckham was not mere dictum, as was the statement referred to in the opinion of the lower court, but was the very heart of the opinion and announced the doctrine upon which the case was decided. Mr. Justice Peckham further said (at page 41):

> The fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.

In the Eubank case the carrier had the option of reducing its intrastate rate or increasing its interstate rate, and the effect of the State regulation upon the interstate rate was one merely of commercial compulsion, and yet the State regulation was declared unconstitutional. And the same learned Justice, whose opinion in the Eubank case we have been discussing, said in *Ex parte Young*, 209 U. S., 123-145:

> Still another Federal question is urged growing out of the assertion that the laws are by their necessary effect an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous.

The case of *Missouri Pacific Railway Company* vs. *Kansas*, cited by the lower court (Tr. 110) is easily to be distinguished from the present case. In the former case, there was clearly no reason why terminal facilities should not have been established within the State of Kansas at the State line, and there was no reason why the State of Kansas should not require the railway company to perform its duty as an intrastate common carrier. It is not conceivable how the establishment of a station at the State line and the operation of an intrastate train would necessarily have interfered with interstate commerce. This Court has repeatedly held, however, that where sufficient facilities are furnished for intrastate traffic the States cannot require the stopping of interstate trains, and in the recent case of *St. Louis Southwestern Railway Company* v. *State of Arkansas*, 217 U. S., 136, this Court held that interstate commerce was unconstitutionally regulated by a statute of the State of Arkansas making it the carrier's duty to supply cars to shippers on demand, the conflict arising not in connection with any direct act of Congress but merely in connection with a rule of the car-

riers themselves, adopted in connection with the interchange of cars throughout the United States.

In that case this Court again observed the rule that, whenever the subject affected by a State laws is in its nature national, or requires one uniform rule or plan of regulation, Congress alone can regulate, and the inaction of Congress is evidence to the Court of its intention that commerce in this respect shall be free and untrammeled.

The Facts Established Show an Interference with and Burden upon and a Regulation of Interstate Commerce which is Prohibited by Settled Principles of Law.

As was said by Judge Sanborn in the case of *Shepard* v. *Northern Pacific Railway Company*, *supra*, (at page 769):

> The principles and rules of law, by which these orders and acts must be tried, have been conclusively established by the decisions of the Supreme Court.

It is respectfully submitted that the following doctrine has been established:

The power to regulate commerce "among" the States is granted by the Constitution to the Congress of the Nation. The United States, in the exercise of that power to its utmost extent, may use all means requisite to its complete exercise, and no State by virtue of any power it possesses, either under the name of the police power or under any other name, may lawfully restrict or infringe this grant or the plenary exercise of this power, for these are paramount to all the powers of the State and inhere in the supreme law of the land. To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce, the Nation by its Congress and its courts may affect and regulate intrastate com-

merce, but no farther. To the extent that it does not substantially burden or regulate interstate commerce, or conflict with a law of Congress within its powers, a State may regulate the intrastate commerce within its borders, but no farther. If the plenary power of the Nation to protect the freedom of and to regulate commerce "among" the States, and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter give way, because the Constitution and the Acts of Congress passed in pursuance thereof are the supreme law of the land, "and that which is not supreme must yield to that which is supreme". And such laws of the State or orders of its Commission relating to intrastate commerce, which, by their necessary or natural or probable operation, have the effect substantially to burden interstate commerce, are beyond its powers, violative of the commerce clause of the Constitution, and void. The question as to whether or not the statutes and orders of State Legislatures and Commissions substantially burden interstate commerce may not be answered by the words or terms of the laws and orders, or by a consideration of the intent or purpose of their makers alone. The true answer to the question, and the test of the validity of the orders and statutes, is to be found in their *effect* upon commerce "among" the States, which is under the exclusive jurisdiction of the Congress. Congress has the exclusive power to regulate commerce "among" the States, and if the relation of the means to the end is shown to exist, and if the use of the particular means is not prohibited by the Constitution, the question of the degree of its appropriateness, of its greater or less adaptation, and of its relative or absolute necessity, is purely political, and the determination of Congress with regard thereto is binding upon the courts. "Let the end be

legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." When the commerce sought to be affected is completely internal and does not extend to or affect other States, and when the subject from its local nature does not seem to require a uniform rule of regulation, the State may regulate; but where the subject is national in its character and demands uniformity of regulation, Congress alone can legislate, and when Congress has not legislated it necessarily follows that that subject is to be free from all legislation whatever.

When Congress has not legislated upon the subject, the Federal Courts will enforce the national power over commerce "among" the States in accordance with that common law enforced generally throughout the United States and operating upon all commercial transactions.

The principles and rules by which the order of the State Railroad Commission, herein complained of, must be tried, having been so settled, it is submitted that, upon the facts as established, this case is brought within the rule, and the orders of the State Commission are shown to be violative of the Constitution of the United States.

The one object overriding all others in the adoption of the Constitution of the United States was to keep the commercial intercourse among the States free from all invidious and partial restraints, and to prevent discriminations by one State against the commerce of other States; and the letter and spirit of the laws enacted under the Constitution require equality of rights to all shippers.

Any state act which directly and unavoidably reduces the revenue of interstate carriers on interstate traffic, or which directly or unavoidably diverts traffic

from interstate to intrastate channels, necessarily amounts to a regulation of and interference with interstate commerce.

The State regulation complained of would directly and unavoidably reduce appellant's interstate revenues, because interstate shippers and passengers will reship and rebuy tickets within the State in order to cut the interstate rates by a combination of intermediate interstate rates and reduced intrastate rates prescribed by the State; the spirit and letter of the Act to Regulate Commerce prohibit interstate rates in excess of combination of intermediate rates; and for these reasons the State regulation complained of necessarily amounts to, interferes with, and regulates interstate commerce.

The entire proposition may be briefly and simply expressed in syllogistic form as follows:

1. If the Order of the Railroad Commission of Kentucky complained of herein, as reasonably interpreted, if put into effect, either directly or by its necessary operation would interfere with, burden, or amount to a regulation of interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted.

2. The State Order, as reasonably interpreted, if put into effect, would by its necessary operation interfere with, burden, and amount to a regulation of interstate commerce, because:

(a) It would directly and unavoidably and with compelling force interfere with and reduce appellant's interstate revenues and interstate rates, and would reduce or destroy appellant's interstate traffic.

(b) It would destroy commercial relationship for many years existing between points in the State of Kentucky and points outside of the State and would create unjust discriminations in favor of the citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

(c) It would, where any election exists, directly and unavoidably and with irresistible force compel appellant either to reduce its interstate rates and inter-

state revenues or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other states.

3. Therefore, the Order of the Kentucky Railroad Commission, herein complained of, must be adjudged to be an interference with and an attempted regulation of interstate commerce, invalid, unconstitutional and void.

Upon the grounds urged, supported by the authorities cited, it is respectfully submitted that the order appealed from should be reversed, with direction to the court below to grant appellant the interlocutory injunction prayed for.

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APPENDIX.

KENTUCKY STATUTES CONCERNING RAILROADS REFERRED TO IN THE FOREGOING BRIEF.

Section 816. *Extortion—what is.* If any railroad corporation shall charge, collect or receive more than a just and reasonable rate, toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion. (Held to be void in *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132.)

Sec. 817. *Discrimination—what is.* If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination. (See Con., Secs. 213-218.)

Sec. 818. *Preference or advantage forbidden—rules defining same—quantity of freight.* It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person

or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more carloads of freight shall be transported at the same time for different persons, and for each shipper a carload or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law; and when less than a carload of freight and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds and less than five thousand pounds are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight. (Held to be void in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep. 491-2.)

Sec. 819. *Penalty and damages for extortion—discrimination—preference—jurisdiction—duty of Commission—limitation.* Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line or railroad may run, owned

or operated by the corporation alleged to be guilty as aforesaid, and the Franklin Circuit Court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporations shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued. (See Con., Secs. 213-218.) (Held to be void in *Louisville & Nashville R. R. Co.*, 99 Ky. 132.)

Sec. 820. *Long and short haul over same road—penalty—jurisdiction of courts—duty of Commission.* If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating, runs or carries on its business. Upon complaint made to the Railroad Commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Com-

mission to investigate the grounds of complaint, and if, after such investigation, the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, it shall be the duty of the Commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper efforts to see that such company or carrier is indicted and prosecuted. (See Con., Sec. 218.)

Sec. 821. *Three Commissioners—duties.* There is established a department in the State government to be known as the Railroad Commission, which shall be composed of three Commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. Each of said Commissioners is authorized to administer oaths, and two of them shall constitute a quorum.

Sec. 829. *Complaints against companies—award of Commission—proceedings upon.* The Commission shall hear and determine complaints under Sections 816, 817 and 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the Commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of such controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in *ordinary* cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other *ordinary* cases. If a trial is demanded the case shall be tried, in all respects, as other *ordinary* cases in which the same amount is involved, except that *no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence;* the judgment and proceedings thereon shall be the same as in other *ordinary* cases.

Sec. 2290b. *Adopting 1903 edition.* That the edition of the Kentucky Statutes, compiled and edited by John D. Carroll, and issued in one thousand nine hun-

dred and three, be, and the same is hereby adopted, as the law of the State, and in all actions and proceedings, the laws therein contained, from Section 1 to Section 4879 inclusive, including amendatory or supplemental sections, may be cited and referred to as the law of the State by reference to any citation of said sections, and any of the chapters or sections therein may be amended or repealed by the General Assembly in the manner now provided by reference to and citation of the chapter and section without giving the date or title of the Act from which the chapter or section is taken: Provided, *That this Act shall not be construed to render valid any invalid chapter or section or part thereof embraced in said statutes,* or to amend, modify or repeal any law or part thereof now in force or effect and not included in said statutes.

FILED
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No. 23

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

ADAM T. SILER, LAURENCE B. FINN AND LEV P. TAUETON, Individually, and as constituting the RAILROAD COMMISSION OF KENTUCKY, Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Court Below: Southern Judicature Circuit Court, Consisting of Circuit Judge Warrington, District Judge Walker Baker, Presiding Judge and District Judge Hazel.

BRIEF FOR APPELLEES.

Lawful of Power of the States to Regulate Rates.

JAMES BREATHITT,
Attorney General.
EDWARD W. HINES,
For Appellees.

CHARLES C. McCHORD,
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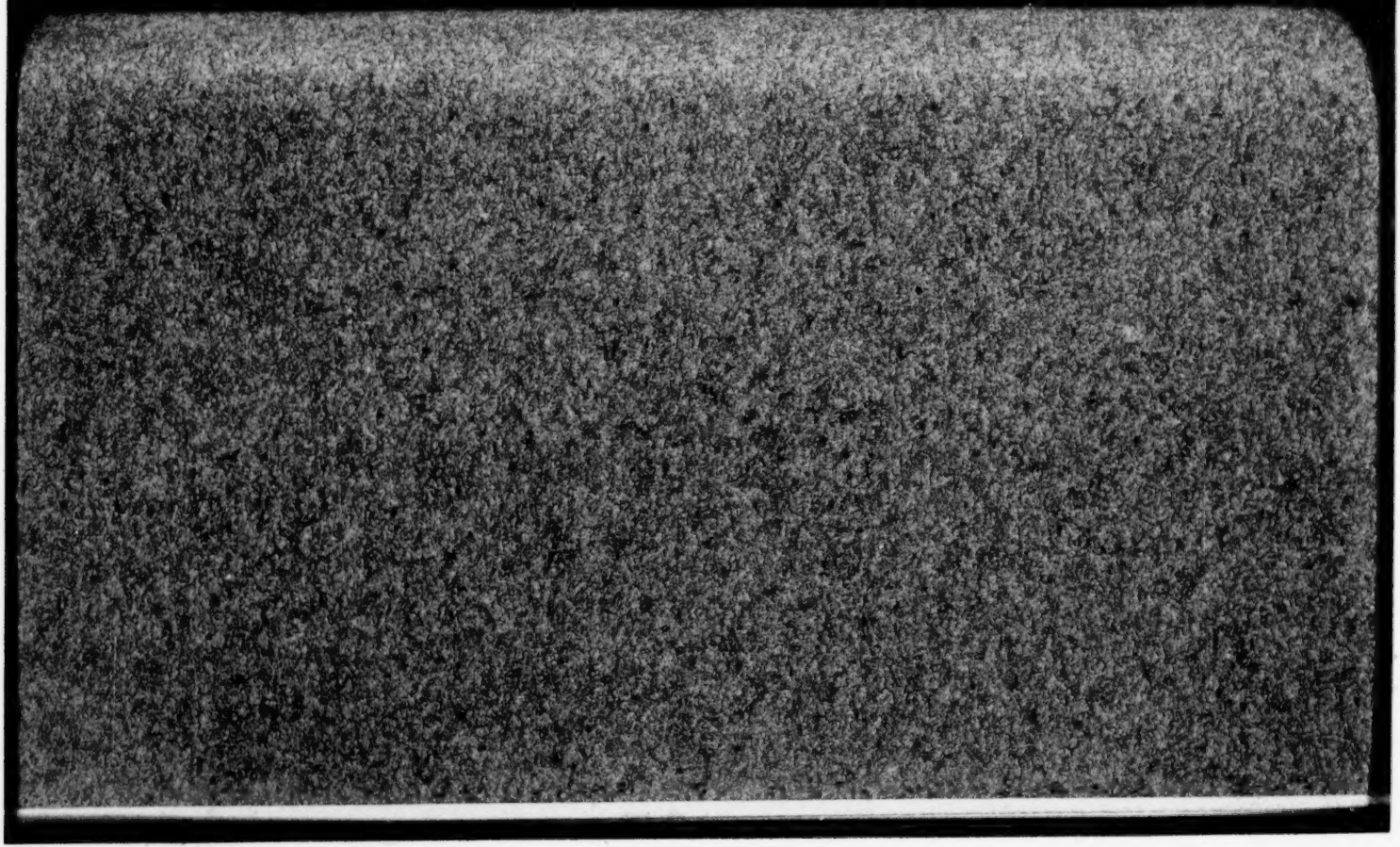

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SUPREME COURT OF THE UNITED STATES

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellant*,

vs.

ADAM T. SILER, LAURENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - *Appellees.*

BRIEF FOR APPELLEES.

This is an appeal from an order refusing to grant an interlocutory injunction. The bill was filed by the Louisville & Nashville Railroad Company against the three members of the Kentucky Railroad Commission as individuals and as constituting the Railroad Commission of Kentucky to enjoin them from putting into effect an order fixing rates to and from certain points on plaintiff's line, at which distillery plants are located, upon grain and other commodities used in the manufacture of whiskey, and also from putting into effect an order making reparation to the companies operating those plants on account of extortionate charges collected in the past. The defendants in making the first of the two orders com-

plained of, which will be referred to as the rate order, acted under the authority conferred upon them by Act of the Kentucky Legislature approved March 10, 1900, which is popularly called the McChord Act, and now appears as Section 8 70a of the Kentucky Statutes. The second order, which will be referred to as the reparation order, was made by defendants under other statutes.

The McChord Act makes it the duty of the Railroad Commission of Kentucky upon complaint or information that any railroad company is charging extortionate freight or passenger rates over its line of railroad in Kentucky, to investigate the matter as speedily as possible after ten days' notice by letter to the carrier of the time and place of hearing, the Commission being required to hear such "statements, arguments or evidence offered by the parties" as it may deem relevant. If upon this hearing the Commission finds that the carrier is or has been "guilty of extortion" it must fix a just and reasonable rate for the future, and if the carrier thereafter charges more than the rate thus fixed it is to be deemed "guilty of extortion," and punished as provided by the statute.

The complainant had for many years given special rates upon distillers' supplies to the distillers upon whose complaint the orders in question were made, and the withdrawal in March, 1910, of those special rates, which had been given in the form of rebates, upon the ground that the manufactured product was shipped out over the complainant's line, and which were lawful for that reason (Louisville & Nashville R. Co. v. Common-

wealth, 108 Ky. 628), was the occasion of the filing of the complaint before the Railroad Commission under which the orders attacked by the Louisville & Nashville Railroad Company, as complainant, were made. The change made by the withdrawal in March, 1910, of the special rates which had been in force resulted in an increase in some cases of one hundred per cent.

The order of the Commission fixing rates for the future, omitting the rates fixed, reads as follows:

> "The complainant herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communication from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House in the city of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Laurence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission, and by agreement of parties the 28th of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties, and on said day and date pursuant to said agreement the Commission met at the Galt House in said city, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

"The Commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected, and received by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable, and by charging said rates defendant is, and has been guilty of extortion.

"It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is hereby forbidden to charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:"

It does not appear from the bill how the quantity of the commodities covered by the rates complained of which are shipped to consignees other than the distillers compare with the quantity of such commodities shipped to the distillers, but affidavits filed by defendants in opposition to the motion for an interlocutory injunction show that the quantity shipped to others than the distillers at the several points in question is inconsiderable, and it also appears from the affidavits that the evidence heard by the Commission showed that at one or more of those points the distillers were the only persons receiving such commodities. District Judge Cochran, after granting a temporary restraining order, refused to sit in the case because he had as counsel attacked the statute which is here attacked by complainant, and Circuit Judge Warrington, to whom the case was then assigned, called to his assistance to hear the motion of complainant for an interlocutory injunction, District Judge Deni-

son, now Circuit Judge, and District Judge Sanford, this being done pursuant to Section 17 of the Act of Congress approved June 18, 1910, entitled:

"An act to create a commerce court, and to amend the act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, as hertofore amended, and for other purposes."

That section provides:

> "That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges. * * * An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The defendants filed demurrer to the whole of the bill upon the ground that the court was without jurisdiction, that the bill was wanting in equity, that it was multifarious, and that complainant had an adequate remedy at law, and also filed a demurrer to that part of the bill

which seeks to enjoin the enforcement of the reparation order. The court, after full argument both orally and by briefs, overruled the motion for an interlocutory injunction; but, upon condition that an appeal be perfected within thirty days and that the difference between the rates complained of and the rates fixed by the Commission be paid into court from month to month, the court continued in force the restraining order pending the appeal. The court in an elaborate and illuminating opinion (Trans., pp. 85-112) the reasoning of which we believe to be unanswerable, held the McChord Act and the rate order made pursuant thereto to be valid, but refused to pass upon the validity of the reparation order for the reason that the distillers upon whose complaint the order was made were necessary parties and were not before the court.

There is no allegation in the bill that the rates fixed are so unreasonably low as to deprive the complainant of its property without compensation, or that the rates are confiscatory, but merely that the rates fixed "are unreasonably low and unjust." It is alleged that the evidence introduced before the Commission bore no "proper relation" to the justness or reasonableness of rates for transporting the commodities and supplies in question when to be used for distilling purposes, and that no evidence was introduced which tended to show what might be a just or reasonable rate on the commodities in question between the points named in the order of the Commission. It is further alleged that the only question brought before the Commission for investigation was the

making and fixing of rates on certain commodities to be used in the manufacture of whiskey and that, therefore, the Commission had no power to make an order fixing rates on those commodities when used for other purposes. A copy of the complaint filed before the Commission is filed with the bill, and it appears from that copy that the complainants did ask the Commission to fix a rate for the transportation of the commodities named without regard to the purposes for which they might be used. (Trans., p. 57.) Besides, the statute does not require a written complaint, and only a notice by letter as to the "nature" of the matter to be investigated is necessary. There is no allegation in the bill that such notice was not given, or that the matter to which the order of the Commission relates was other than that of the proposed investigation of which complainant had notice. The Commission, therefore, had jurisdiction of the question upon which it passed, and the complainant merely places its judgment against that of the Commission as to what the evidence tended to show. There is no allegation that the Commission acted arbitrarily or in bad faith, or that it did not consider the evidence heard and in good faith determine that it showed that the rates fixed were reasonable. It is alleged, however, that the order of the Commission affects interstate rates, and is, therefore, a regulation of interstate commerce and void for that reason.

ARGUMENT.

I.

Statute Does Not Violate Fourteenth Amendment or Kentucky Constitution.

Two cases arising under the McChord Act have been before this court, the first of those cases being McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, and the second being Siler v. Louisville & Nashville R. Co., 213 U. S. 175. The first of these cases originated in the United States Circuit Court for the District of Kentucky, the State then not having been divided into two districts, and the second case originated in the Eastern District after the division of the State into the Western and Eastern Districts. In each of those cases this court refused to pass upon the validity of the statute. In the first case the court held that the suit for an injunction was premature as the Commission had not fixed any rates under the act. In the second case upon appeal from the Eastern District it was held that the Commission had no power to make complete schedules of rates, but only to pass upon special cases upon complaint or upon its own information.

The history of the McChord Act is important. In Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, the Court of Appeals of Kentucky held Section 816 of the Kentucky Statutes to be void for uncertainty to the extent that it created the criminal offense of extortion, the ground of that decision being that the carrier could

not possibly know in advance whether or not he was violating the law, no standard of reasonableness being fixed, thus leaving his guilt or innocence to be determined by the opinion of each jury as to what was reasonable. The McChord Act was then passed conferring upon the Railroad Commission the power to fix rates upon complaint or upon receiving information that extortionate freight or passenger rates have been charged, the rates thus fixed to be thereafter the only rates which the carrier may lawfully charge, and penalties being prescribed for charging rates in excess of those thus fixed. Neither the construction nor the validity of this statute has ever come before the Kentucky State courts for determination, but as already stated this court has twice considered the statute in proceedings in which it was directly attacked, and the court has also once considered the statute in a case in which it was not directly involved, the case referred to being Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503.

McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, was an appeal from a judgment of the United States Circuit Court for the District of Kentucky in the case of Louisville & Nashville R. Co. v. McChord, reported in 103 Fed. 216, in which District Judge Evans held the McChord Act to be unconstitutional, and enjoined the Railroad Commission from making any rates thereunder. In that case this court, reversing the judgment appealed from, held the McChord Act to be merely in aid of Section 816 of Kentucky Statutes, and that the various provisions of the Kentucky Statutes re-

lating to the offense of extortion attempted to be created by that section applied to the offense of extortion created by the McChord Act, from which the conclusion followed that no indictment could be returned for that offense unless recommended by the Railroad Commission as provided by Section 819 of Kentucky Statutes. The court then held that as no indictment could be returned except upon the recommendation of the Railroad Commission, the carrier could be fully protected after rates had been fixed by the Commission by a proceeding to enjoin the Commission from recommending indictments, and that the suit was therefore premature. This conclusion has an important bearing on the construction of the provisions of the statute as to penalties as will hereinafter be shown.

The principal ground upon which the statute is attacked is that it is void upon its face because it cuts off judicial inquiry as to the reasonableness of the rates fixed by the Commission, it being contended that such judicial inquiry is not only cut off by the provision that it shall not be lawful to charge more than the rate fixed by the Commission, but also by the provision for penalties which are alleged to be so excessive that the carrier can not take the risk of going into the courts to test the validity of the statute, although the complainant alleges that if the interlocutory injunction be refused, it will take that risk until compelled by the court of last resort to obey the order of the Commission.

That the fixing of rates whether by the Legislature or by a Commission pursuant to its authority is purely

legislative in its character can not now be doubted (City of Knoxville v. Knoxville Water Co., 212 U. S. 1), and the courts can never inquire as to the wisdom or reasonableness of legislative action. The only judicial inquiry allowed is whether or not the law-making body has exceeded its power. The word "reasonable" is used in one sense as applied to rates made by a carrier and in another and different sense as applied to maximum rates fixed by the Legislature or by some subordinate body to which the Legislature may have delegated the power to make rates, and some courts in considering cases of this nature have used the word "reasonable" first in the one sense and then in the other without indicating the change of meaning, thus causing confusion of thought. The distinction between these two uses of the word is pointed out by Judge Noyes with great clearness in his admirable work on "American Railroad Rates," in which at page 211, he says:

> "The standard of reasonableness applied by the courts in determining the validity of a schedule of rates prescribed by legislative authority, is essentially different from that considered in a controversy between a shipper and the railroad. As we have seen, the courts, under the common law, have power to pass upon the reasonableness of the charges of common carriers. In determining the question of reasonableness, the courts must consider all the factors entering into the rate. They may substitute their judgment of a just and proper charge for that of the carrier. But the courts can not substitute their judgment of a reasonable rate in place of that of the Legislature or the Legislature's subordinate body. The act of the Legisla-

> ture in fixing a rate is a law that such shall be the rate. The courts can no more question its expediency or propriety than in the case of any other law. It is immaterial whether they think, under all the circumstances, that it should have been greater or less. The courts have nothing to do with legislative-made rates except to determine whether they violate constitutional provisions. The inquiry is whether the rates prescribed by law are so unreasonably low as to infringe the property rights of the railroad. The duty of the courts is to determine whether the rates are confiscatory, not whether they are fair between shipper and carrier."

In Stone v. Farmers' Loan & Trust Co., 116 U. S. 307 (at p. 331), the court by Mr. Chief Justice Waite, thus stated the limitation which the law places upon the power of the State to regulate rates:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, the court distinctly held that the fixing of rates is not a judicial function, and that as to rates fixed by a commission the only question for the courts is whether or not the rates are so low as to work a practical destruction of rights of property.

In that case the court, by Mr. Justice Brewer, said (397):

> "The courts are not authorized to revise or change the body of rates imposed by a Legislature or a Commission; they do not determine whether one rate is preferable to another; or what, under all the circumstances, would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work."

It has been so repeatedly held by this court that the only judicial inquiry which can be demanded as to rates fixed by law is as to whether or not they are confiscatory that it would be useless to review the cases, it being sufficient to merely cite a few of them.

St. Louis & S. F. R'y Co. v. Gill, 156 U. S. 649.
Smyth v. Ames, 169 U. S. 466.
Minneapolis, etc., R'y Co. v. Minnesota, 186 U. S. 257.
Prentis v. Atlantic Coast Line Co., 211 U. S. 210.
City of Knoxville v. Knoxville Water Co., 212 U. S. 1.
Willcox v. Consolidated Gas Co., 212 U. S. 19.
Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579.

In Chicago, etc., Co. v. Tompkins, 176 U. S. 167, upon which counsel for complainant relied in the lower court, the statute under which the schedule of rates complained of was made, manifestly declared the rates which might be fixed by the Commission to be the only legal rates, and yet the court assumed that it could only interfere in the event the rates should be found to be confiscatory. The court, referring to the Legislature, said:

> "Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene."

The court also declared that the owners of railroad property may not be deprived of their property "by the arbitrary enactment of any legislature" without any right of appeal to the courts, but the court held that the complainant in that case was not deprived of its property by the "arbitrary enactment" of the Legislature unless the rates fixed by the Commission pursuant to legislative authority were so low as not to be compensatory. The court said that the burden was on the complainant to prove that the statute infringed "the constitutional guaranty of protection to property," and also held, in effect, that that guaranty was not infringed by the mere enactment of the statute, or by the action of the Commission thereunder, unless the rates fixed by the Commission were so low as not to yield a fair return. In fact, the court in that case seemed to assume that the rates were not unreasonably low if they would yield any profit whatever. The court further said in that case:

> "The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, this court held that Section 218 of the Kentucky Constitution was not in conflict with the Federal Constitution. That section prohibits the charging of

more for a short haul than a long haul, over the same line in the same direction, the shorter being included within the longer distance, with the following proviso:

> "Provided, that upon application to the Railroad Commission such common carrier, or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operations of this section."

The court held that the proviso quoted was valid, notwithstanding the great power which it confers upon the Commission, and notwithstanding the fact that the finding of the Commission is made final and conclusive. The court referred to the fact that the Kentucky Legislature had conferred upon the Commission the power to fix rates, and in a later part of its opinion, by Mr. Justice Shiras, said:

> "We do not wish to be understood as intimating that if, hereafter, the Railroad Commission should fix and establish rates of a confiscatory character, the company would be without the protection which courts of equity have heretofore given in cases of that description."

Again in the same case the court, after citing Smyth v. Ames, 169 U. S. 466, and other cases, said:

> "We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the Railroad Commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal Courts to interfere with the legislative department of the State government when acting within the scope of its admitted powers is always the exercise of a delicate power—one that should not be resorted to unless the reason for so doing is clear and unmistakable."

It is quite clear that the court believed that the principle upon which it based its decision was conclusive as to the power of the Legislature to authorize the Commission to fix rates which should be final, and that the only limitation upon the power was that the rates fixed should not be confiscatory.

As to the power of the Legislature to make the decision of the Commission final, the court said:

> "Finality is a characteristic of the judgment of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers

> have proceeded. If there are charges of fraud or corruption the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

Counsel for the railroad company rely strongly upon the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418. In that case the Commission was authorized to fix rates without hearing or notice, and the State court refused to give the carrier any hearing whatever as to whether or not the rates were reasonable. This court held that there must be a hearing at some stage of the proceeding, and that accepting the construction of the State court the statute must be held void. The State court had held that although the rates had been fixed without a hearing there could be no judicial inquiry as to the reasonableness of the rates even though they might be confiscatory. It is true that it does not appear that the response of the railroad company to the application for a writ of mandamus to put into force the rates fixed by the Commission alleged that those rates were so low as to be confiscatory, but the response did allege that they were unreasonably low, and the State court held that in no event could the courts inquire as to whether or not the rates were reasonable. It was clear, therefore, that if the judgment requiring the rates to be put into effect should stand the door would be closed to the carrier, under the construction which the State court placed upon the statute. There was no room, therefore, for the presumption that the carrier could have a hearing in

the State courts as to whether or not the rates were confiscatory.

In San Diego Land & Town Co. v. National City, 174 U. S. 739, the court undertook to determine what had been decided in the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418. That case involved the validity of water rates fixed by municipal ordinance. The court, by Mr. Justice Harlan, after quoting from its opinion in the Minnesota case, said:

> "Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that State.
>
> "What this court said about the Minnesota statute can have no application to the present case unless it be made to appear that the Constitution and laws of California invest the municipal authorities of that State with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject. The contention of appellant is that such is the purpose and necessary effect of the Constitution of the State. We are not at liberty so to interpret that instrument."

The court then referred to the provisions of the Constitution and laws of California giving the water company an opportunity to be heard before the rates were fixed, and quoted from the case of Spring Valley Water Works v. San Francisco, 82 Cal. 286, as follows:

> "When the Constitution provides for the fixing of rates or compensation, it means reasonable rates

and just compensation. To fix such rates and compensation it is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts can not, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

The ordinance involved in the case of San Diego Land & Town Co. v. National City, expressly provided that no person should receive water rates in the city except as established by the ordinance, thus showing clearly that it was not contemplated that so long as the municipal authorities kept within their jurisdiction there should be any judicial hearing as to the reasonableness of the rates, but notwithstanding that fact the court said that the only inquiry for the court was whether or not the rates were so low as to deprive the company of its property without compensation, the company having had opportunity to be heard before the rates were fixed.

As the statute we are considering provides for notice and hearing, and such notice and hearing were had before the rates complained of were fixed, the case of Chicago, etc., R'y Co. v. Minnesota, is no more applicable here than it was in San Diego Land & Town Co. v. National City, and interpreting that case as the court

has done the argument of counsel for complainant falls to the ground.

The case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, involved the validity of city ordinances fixing telephone rates. In an opinion by Mr. Justice Moody, the court said:

> "The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the Fourteenth Amendment of the Constitution of the United States, because the Section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function, and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings, and, for peculiar reasons, in some forms of taxation (citing case) would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council, by Section 31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of charges, and that, if charges were fixed in that manner, the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. (Citing case.) Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function, would be left to the discretion of the body exercising it. It must not be forgotten that, presumably, the courts of the States, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether

such confiscation exists. But we need not now decide whether notice and hearing were required. Both were given in this case."

The statute contemplates that as long as the Commission keeps within its power there shall be no judicial inquiry as to the reasonableness of the rates which it may fix. When, however, the Commission fixes rates which are so low that they amount to confiscation it exceeds its power, and its action is void. Neither the Legislature nor a Commission pursuant to its authority has any power to go beyond the limits of regulation into the territory of confiscation, and when the Commission does that, it is beyond its power. The statute does not contemplate that if the Commission should go that far there should be no judicial inquiry as to its acts. Until the State courts have refused to grant a hearing as to the validity of the orders of the Commission it must be presumed that they would do so if a proper case should be presented to them. Of course, that presumption would not preclude this court from making an inquiry as to whether or not the rates are confiscatory if it were called upon to do so, but the carrier has not asked the court to make that inquiry in this case. What the carrier does ask the court to do is to hold that the State by the statute in question has cut off that inquiry. For the Commission we insist that such an inquiry can not be cut off by the mere enactment of the statute, or by the action of the Commission under the statute, the presumption being, as this court has said, that the State courts are open for such an inquiry.

Just as any citizen has the right to question the constitutionality of a statute which injuriously affects him, although the statute does not expressly give him that right, so a carrier has the right, without any express provision in the statute giving him that right, to question a rate order of the Commission upon the ground that the Commission has exceeded its power, as by refusing to hear any evidence or by fixing a rate so low as to be confiscatory. It would hardly be contended that the statute is void because it does not expressly provide for a hearing in the courts as to whether or not the Commission arbitrarily refused to hear any evidence, and yet there seems to be no more reason why the statute should expressly provide for a hearing as to any other matter as to which the carrier is entitled to be heard than there is why it should expressly provide for a hearing as to that matter. Therefore, the failure of the McChord Act to expressly provide for a hearing as to the validity of the orders of the Commission does not render it unconstitutional. Even if the statute expressly provided that the carrier should never be heard as to whether or not the rates fixed by the Commission were so low as to deprive him of his property without due process of law that part of the statute would be held void and the remainder of the statute upheld, and certainly that which if expressed would be void can not be implied.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.

But the railroad company says that even though the statute does not cut off a judicial hearing as to whether or not the rates are confiscatory it certainly does cut off a judicial hearing as to whether or not the rates are reasonable as between the carrier and the shipper. If, however, a right of appeal to the courts were given the action of the courts upon the appeal would be legislative merely, as held in Prentis v. Atlantic Coast Line Company, 211 U. S. 210, and as the railroads have no constitutional right to legislative action by the courts, they can not complain that no such right of appeal is given. Indeed, it seems that the power to hear such an appeal could not be conferred upon the Kentucky courts, as that would be to confer upon them legislative power.

Counsel for the railroad company insist, however, that the statute should have given a right of review by declaring the rates fixed by the Commission to be only *prima facie* reasonable, and that the statute could not otherwise be valid. It is true that under a statute declaring the rates fixed to be only *prima facie* reasonable the courts would not fix rates for the future, but would merely set aside rates fixed by the Commission, and yet the courts would pass upon the same question upon which the Commission passed, the only difference being that some weight would be given to the finding of the Commission. If the courts should not agree with the Commission the order of the Commission would be set aside, and nothing substituted therefor, however extortionate may have been the rates previously charged by the carrier. There must be power somewhere to fix

rates for the future which shall be the only legal rates subject only to the restriction that they shall not violate any right secured to the carrier by the Constitution, and as the fixing of the rates for the future is not a judicial function, the Legislature must have power to delegate that authority to the Commission. Whether the Commission shall have power to fix rates which shall be only *prima facie* reasonable, or power to fix rates which shall be conclusively reasonable, depends upon how much power the Kentucky Constitution authorizes the Legislature to confer upon the Commission. The Federal Constitution does not interpose any barrier to the making by the Legislature of rates which shall be the only legal rates, except the restriction that the rates shall not be so low as to take the carrier's property without compensation, and if the Legislature has the power to make rates subject only to that restriction the question as to whether or not it may delegate that power to the Commission must be answered by the Kentucky Constitution. We are now considering only the question whether or not the statute violates the Federal Constitution, and so we assume for the present that there is nothing in the Kentucky Constitution which condemns such a statute.

If perchance the court should conclude that the Legislature had no power to give finality to the rates fixed by the Commission the statute would then be void only to that extent, and the order of the Commission would be valid, but the rates only *prima facie* reasonable.

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, the enforcement of rates fixed by a Commission was enjoined because the carrier's earnings would be so diminished thereby that the carrier would not be able to pay one half the interest on its bonded debt above the operating expenses, but the court refused to enjoin the Commission from making other rates, and in answer to the objection that the statute authorizing the Commission to make rates was void because of excessive penalties and because it declared the rates made by the Commission to be conclusive, the court, by Mr. Justice Brewer, said (p. 395):

> "We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the Commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads."

In many of the cases in which the validity of rates fixed by a State Legislature or by a tribunal pursuant to legislative authority has been involved, the law in question has provided, in effect, that the rates fixed should be conclusively presumed to be reasonable, and yet in every one of those cases except the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, this court has in-

quired whether or not the rates were confiscatory, and has never held that the mere fact that the statute contemplated that the finding made by the Legislature or pursuant to its authority should be final, provided it was not confiscatory, was sufficient to render the statute unconstitutional. In the Minnesota case the Supreme Court of the State had precluded all judicial inquiry as to whether or not the rates were confiscatory, and this court was forced to hold that the statute as thus construed was void, there having been no hearing before the rates were fixed. In the case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, the court intimated very strongly, as we have already seen, that it is not even necessary that there should be any notice or hearing to give validity to rates fixed pursuant to legislative authority, and held that it must be presumed that the State courts would be open for the only judicial inquiry to which there is a constitutional right, and that is the inquiry as to whether or not the rates are confiscatory.

In *Ex parte* Young, 209 U. S. 123, the validity of rates fixed by a Commission as well as of rates fixed by the Legislature was involved, and it was assumed that the statute contemplated that the rates fixed by the Commission should be final and conclusive so long as they were not confiscatory, but the court held that the action of the Commission in fixing rates was void only in the event the rates fixed were confiscatory.

In Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579, in which the court affirmed a decree of the

Supreme Court of North Dakota requiring the Northern Pacific Railway Company to put into effect specific rates on coal fixed by statute, the court, by Mr. Justice Holmes, said:

> "The carriage of coal is a very small part of the railroad's business. The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point. We are far from saying that the argument for doing so does not seem to us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Willcox v. Consolidated Gas Co., 212 U. S. 19, 23 L. Ed. 382, 29 Sup. Ct. Rep. 192, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

The court there held not only that the only ground upon which the carrier could complain of rates on coal was that the rates were confiscatory, but that that question could be more satisfactorily determined after a practical test, and that test should always be required

where the penalties are not so excessive as to overwhelm the carrier.

The mere fact that it may be difficult for the carrier, where only a few rates are changed by law, to show that the new rates are confiscatory does not furnish any reason for applying a different rule in such cases. Minneapolis, etc., R'y Co. v. Minnesota, 186 U. S. 257, was a case of that kind, involving the validity of a reduction by the Minnesota Railroad Commission of rates on hard coal in carload lots. The court, by Mr. Justice Brown, said:

> "It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis & St. Louis Company upon their tracks at Minneapolis. Besides this, coal in carload lots was a comparatively insignificant item of the total freight carried, being but 2,583 tons for an entire year. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the Commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low. The charges for the carriage of freight of different kinds are fixed at different rates according to their classification, and this difference, persumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size and value of the packages and the cost of handling them.
>
> "Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at

> the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots."

Again in the same case the court, referring to reductions made to meet competition, said:

> "While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

There seems to be no reason why the courts may not be required to give at least as great weight to the findings of a State Railroad Commission as to what are reasonable intrastate rates as they may be required to give to the findings of the Interstate Commerce Commission as to what are reasonable interstate rates, and it seems to be well settled that the findings of the Interstate Commerce Commission as to what are reasonable interstate rates can not be reviewed by the courts. It is only where the Commission has transcended its power, as by reducing a rate because of some supposed equity, and not because it is found to be unreasonable, that the courts will interfere. In other words, power to make the order, and not the mere expedience or wisdom of the order, is the question for the courts.

Interstate Commerce Com. v. Ill. Cent. R. Co., 215 U. S. 452.
Southern Pac. Co. v. Interstate Commerce Commission, 219 U. S. 433.

But it is said that the penalties are so excessive as to overwhelm the plaintiff in the event the statute should finally be held valid, and that the statute, therefore, in effect cuts off all judicial inquiry as to the validity of the statute. It is important, therefore, to determine just what the provisions of the statute as to penalties mean.

Those provisions are as follows:

> "And should said railroad company or corporation or any officer, agent or employe thereof, collect, charge or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars, nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars."

It is clear that there can be but one "first offense" and but one penalty of one thousand dollars for that offense. Since Judge Evans held the statute to be void because of excessive penalties, the Court of Appeals of Kentucky has established a rule for the construction of

such statutes under which the penalties would be moderate and reasonable.

In Wilson v. Commonwealth, 26 Ky. Law Reporter, 685, the court held that under a statute prescribing a penalty for practicing dentistry without license, all acts in violation of the statute, prior to the institution of the prosecution, constituted but a single offense.

Commonwealth v. Standard Oil Co., 120 Ky. 724, which was a prosecution for selling oil without license, is to the same effect.

It is also well settled that the second conviction for which an increased penalty is prescribed means a conviction for an offense committed after the first conviction. Brown v. Commonwealth, 100 Ky. 127.

Such a construction of the statute is altogether reasonable, and any other construction would be a strained one. The court certainly will not resort to a construction which would render the provisions as to penalties void if any other construction can be adopted which is at all reasonable, as it is not to be presumed that the Legislature desired to prevent the carriers from testing the validity of the statute, or desired to oppress them. But it is said that every officer or agent of the carrier who violates the order of the Commission is subject to the penalty, and that this makes the penalties excessive, even though they be not cumulative. In determining, however, whether the penalties are excessive the order as to each rate must be considered a separate order, and the number of officers or agents responsible for charging more than the rate prescribed is necessarily limited.

The fact that the Commission makes many orders at one time, and that the aggregate of the penalties for violating all the orders may be great is immaterial. It must also be remembered that no indictments can be found except upon the recommendation of the Railroad Commission, and there is no reason to presume that the Railroad Commission would overwhelm the plaintiff with prosecutions even if it had the authority to do so under the statute.

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, at page 394, the court, by Mr. Justice Brewer, said:

> "The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the Commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the Commission.
>
> "It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the Legislature of any State or a Commission appointed under the authority of any

> State, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal Courts, sitting as courts of equity."

The reasoning of this court in McCherd v. Louisville & Nashville Railroad Co., 183 U. S. 483, shows quite clearly that the court either considered the penalties not cumulative or conclusively presumed that the Railroad Commission, having full control of prosecutions under the statute, would not seek to destroy the carriers of the State. As no indictments could be returned until an order of the Commission fixing rates should take effect, the court in considering whether or not indictments could be returned without the recommendation of the Commission, was evidently assuming that an order of the Commission might become effective before there would be sufficient opportunity to apply for an injunction, for if the injunction was to be applied for before the order became effective it was quite immaterial whether or not the recommendation of the Commission was necessary to an indictment, it being sufficient in that event to apply merely for an injunction requiring the Commission to suspend or revoke its order before it should take effect, as has been done in this case, ten days being allowed after the entry of the order before it takes effect. The court manifestly thought that the carrier

ought not to be required, in order to protect himself, to proceed within that brief period, or assumed that no injunction could be granted until the order of the Commission should take effect, and, therefore, considered whether or not the carrier could, after the order of the Commission might become effective, have an injunction which would afford him as complete protection as an injunction granted before any action had been taken by the Commission. The court must have known, however, that if the penalties were cumulative, an injunction, after the order became effective, merely restraining the Commission from recommending indictments would not afford adequate protection to the carrier, as the penalties would go on piling up, notwithstanding such an injunction, and so the conclusion follows that the court was of opinion that the penalties were not cumulative, or presumed that the Commission would not seek to oppress or destroy the carriers. That case, therefore, seems a conclusive answer to the argument that the statute is void because of excessive penalties.

Counsel for plaintiff rely upon *Ex parte* Young, 209 U. S. 123, in support of their contention that excessive penalties render the statute void, but aside from the fact that the penalties prescribed by the statute here involved are not excessive, the court in that case very carefully confined the rule there declared to cases in which the rates had been fixed without a hearing. The court said:

> "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject

over which the jurisdiction of the Legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state) and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing ever having been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

The court there uses the expressions "without a hearing" and "no prior hearing having ever been given," and the repetition of the thought shows that the words quoted were not used without due consideration. The court could not have meant that the doctrine announced was restricted to cases in which there had been no prior judicial hearing, for no one would contend that the carrier would be entitled to a second judicial hearing, and the court would not have been so careful to guard against

an interpretation of its opinion for which it would have been absurd to contend. Besides, the court expressly confines the doctrine to the case of the "establishment" of rates without a hearing, and the establishment of rates is a legislative act, and not a judicial act, even though the rates are fixed by a court, as was held in Prentis v. Atlantic Coast Line Co., 211 U. S. 210.

The court also limited the doctrine of the case to penalties imposed for the purpose of preventing, or penalties tending to prevent, any inquiry as to whether or not the rates imposed are confiscatory. In the absence of any allegation by plaintiff that the rates fixed by the Commission are confiscatory, the doctrine of the Young case has no application. So far as appears from the bill the rates of which plaintiff is complaining may yield it a very handsome return. If the rates be not confiscatory there is no reason whatever why the carrier should not obey the order as to all the rates except one until the validity of the order can be determined, the refusal to obey the order as to one rate being sufficient to test its validity.

While the court in the Young case cited the opinion of Judge Evans in Louisville & Nashville R. Co. v. McChord, 103 Fed. 216, in support of the doctrine that the penalties in such a statute may be so excessive as to be void, the court, of course, did not mean to say that Judge Evans had properly applied the doctrine, as it could not do so without giving the case cited the same consideration which it gave the case which it was deciding, and no

court can be presumed to have given that consideration to every case cited in its opinion.

But even conceding that the doctrine of the Young case applies, only the provisions as to penalties are void, and the remainder of the statute stands. It was so held not only in the Young case, but in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, and in the late case of Willcox v. Consolidated Gas Co., 212 U. S. 19.

In Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, in which the court held Section 816 of Kentucky Statutes to be void to the extent that it in conjunction with Section 819, prescribing penalties for its violation, created a criminal offense, the court manifestly intended to leave the statute in force to the extent that it merely prohibited the charging of more than a reasonable rate. In that case the court said:

> "Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury."

It seems clear, therefore, that the provision for penalties might be eliminated from the McChord Act and the remainder of the statute upheld. It is not a case where one part of the statute can be regarded as compensation for the other so as to authorize the conclusion that the part which would remain would not have been enacted without the part stricken out. The statute was

intended to protect shippers, and it would be unreasonable to say that they can not have the benefit of the statute because one of the provisions inserted to insure its enforcement has failed.

The court can not, therefore, enjoin the Commission from putting its order into effect, and it can not enjoin the Commission from recommending indictments for the reason that two of the three defendants have filed affidavits stating that they have never threatened to recommend indictments or to institute prosecutions, and that it is their purpose to test the validity of the statute in the civil courts. It is not made the duty of the Commission to recommend indictments for extortion, but it is merely provided by Section 819 that such indictments shall be returned only upon their recommendation. Section 820 of Kentucky Statutes does provide that it shall be the duty of the Commission to use proper efforts to see that the carriers are indicted and prosecuted for violations of that section, which puts into effect the long and short haul clause of the Constitution, and the difference in the two sections is significant. Section 821, it is true, makes it the duty of the Commission to see that all laws relating to railroads are faithfully executed, but no duty rests upon the Commission to do this by means of criminal prosecution if it can be accomplished in some other way. It is entirely proper that defendants should not resort to criminal prosecution until civil remedies have been exhausted, and surely complainant can not by falsely alleging that defendants are threatening criminal prosecutions preclude defendants from showing the contrary.

If the court holds that the provisions as to penalties, if cumulative, are void, there can be no reason for enjoining the Commission from recommending indictments in view of the denial of defendants that they have ever threatened to recommend indictments, or intend to do so until civil remedies have been exhausted, for if the court holds that the provisions as to penalties are either void or not cumulative the complainant would be in no danger of any accumulation of penalties if some future Commission should recommend indictments.

The plaintiff has alleged that it does not intend to obey the orders of the Commission until compelled to do so, and so there will be full opportunity to test the validity of the law in the civil courts, as it must be presumed that the shippers who may be injured by the violation of the Commission's orders will seek redress.

Besides, Section 821 of Kentucky Statutes makes it the duty of the Railroad Commission to see that all laws relating to railroads are faithfully executed, and the Commission would have power to institute an action in the name of the Commonwealth to compel the carrier to obey the order of the Commission as was done in the case of Commonwealth v. Louisville & Nashville R. Co., 120 Ky. 91, as to an order of the Commission requiring the Louisville & Nashville Railroad Company to operate trains on one of its branches. But if such an action would not lie the Commission would have power to make an award under Section 829 of Kentucky Statutes, which the court in McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, found to be still in force, and appli-

cable to the offense of extortion created by the McChord Act, and would also have power to institute proceedings in court to enforce that award. And even though Section 829 might not be regarded as specifically applying to the McChord Act the Commission under its general powers could make an award and proceed to have it enforced in the courts.

It is contended that the act is void, because it applies to railroad carriers alone, and not to other carriers, and thus deprives railroad carriers of the equal protection of the laws. To this objection the case of Stone v. Farmers Loan & Trust Co., 116 U. S. 307, is a complete answer. In that case the court, by Mr. Chief Justice Waite, said:

> "General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws."

Another objection which Judge Evans found to the statute was that it authorizes the reduction of a rate upon complaint, and thus discriminates against companies against which complaints are filed. It is certainly not unreasonable to presume that rates of which no complaint is made by shippers are reasonable. The circumstances and conditions under which shipments are made on different roads are never exactly the same, nor are

the circumstances and conditions the same even as between different points on the same road, and so there can be no doubt that to authorize the Commission to reduce rates upon complaint is not a discrimination. If that were not true a Commission would have to investigate all rates or none, which can not be the law. It is manifest that the court had no thought when it decided in Siler v. Louisville & Nashville R. Co., 213 U. S. 175, that the Commission had no power to make a schedule of rates that such a construction of the statute would of itself render the statute void. In fact the court said:

> "The difference between the fixing of one rate or a few, upon specific complaint or information, and the adoption of a general scheme of rates, applicable in all cases to all the roads, is vast and important. In the one case it can be fairly accomplished, while, in the other, the chances of injustice and great inequalities are infinite and almost certain to occur."

In Southern Railway Co. v. Bartine, 170 Fed. 725, District Judge Farrington held that a statute authorizing the reduction of a rate upon complaint was not objectionable as discriminating against companies against which complaints were filed.

The statute we are considering here, however, authorizes the Commission to institute an investigation upon any information it may have that extortionate rates are being charged, and so the Commission is not restricted to the reduction of rates upon complaint.

But it is argued that the act is void for the further reason that it confers upon the Railroad Commission leg-

islative, executive, and judicial powers, and is, therefore, an abandonment of a republican form of government. This contention is fully met by the case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210. The court there said:

> "We shall assume that when, as here, a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned."

The case of Trustees of Saratoga Springs v. Saratoga Gas, Electric Light and Power Company, 191 N. Y. 123 (18 L. R. A., N. S. 713), is an interesting and instructive case to the same effect.

This court has so repeatedly upheld statutes conferring upon administrative boards the power to fix rates that it is no longer open to question that such statutes do not violate the Federal Constitution, merely because they delegate legislative power to an administrative board. It is equally clear that the mere fact that the Commission is authorized to perform a judicial act does not bring the statute in conflict with the Federal Constitution. In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the court held that the power conferred by Section 218 of the Kentucky Constitution upon the Kentucky Railroad Commission to hear and finally determine the question as to whether or not a common carrier should be exonerated from the operation of the long and short haul law was not in violation of the Federal Constitution. That power is quite as clearly a judicial power as the power given to the Railroad Commission to determine

whether or not a carrier has charged more than a reasonable rate. In each case the Commission may perform a judicial act, but it does not perform a judicial function. The assessment of property is a judicial act, as has been often held, but it is not a judicial function. Before the Commission can perform the legislative act of fixing a rate for the future it must determine that the carrier is already charging more than a reasonable rate, but the carrier can not complain that the power of the Commission is thus limited. The judicial act is merely incidental to the legislative act, and is only such an act as the Legislature itself performs in determining whether or not particular legislation ought to be enacted.

In Prentis v. Atlantic Coast Line Co., 211 U. S. 210, the court, by Mr. Justice Holmes, said:

> "The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

To the same effect is the case of Southern Railway Co. v. Bartine, 170 Fed. 725.

The Commission does not act as judge in the matter as to which it legislates, as it does not finally determine whether or not its order fixing a rate for the future has been violated.

The finding that the carrier has been "guilty of extortion" which the Commission is required to make be-

fore it can fix a rate for the future is not a finding of criminal guilt, but merely a finding that the carrier has been charging more than a just and reasonable rate, as there is no criminal offense until the Commission has fixed a maximum rate, and that rate has been exceeded by the carrier. As said by the lower court, Mr. Justice Peckham, in Siler v. Louisville & Nashville R. Co., 213 U. S. 175, did not seem to observe any vice in the use of the word "extortion." In that case he said:

> "The statute, it will be remembered, gives no power to the Commission to fix rates, unless it has already determined that the rates complained of, or which it has investigated upon its own information, are extortionate, after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate, there can be no fixing of rates in that particular."

It is also clear that the statute does not violate the Kentucky Constitution. As said by the court in Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the Railroad Commission is a constitutional body, and by Section 218 of the Kentucky Constitution judicial power is conferred upon that body. It was also provided by the Constitution that the powers of the Commission should be fixed by law, but that its powers should continue as they then were until changed by the Legislature. At the time of the adoption of the present Constitution of Kentucky it was not unusual to confer upon Railroad Commissions the power to make rates, and when the Constitutional Convention, instead of conferring that power upon the Commission, left the Legislature free to confer upon the Commission

such powers as it might, in its wisdom, think best, there can be no doubt that the intention was to authorize the Legislature to confer the rate-making power upon the Commission. This is conclusively shown by the debates. The issue before the convention was whether the power to fix rates should be conferred upon the Commission by the Constitution or whether the Legislature should be left free to confer the power or not as might seem wise in future, and it was assumed by all the members who spoke upon the subject that there was nothing in the Constitution which would deny that power to the Legislature. (Debates, Vol. 4, pp. 5038-5050). The argument in opposition to the proposal that the powers of the Commission, including the power to make rates, be fixed by the Constitution was that the powers of the Commission should be flexible so that they might be adapted to varying circumstances and conditions, of which the Legislature should be the judge.

In Pennington v. Woolfolk, 79 Ky. 13, the Court of Appeals of Kentucky held that it was competent for the Legislature to confer upon the county courts functions which were not judicial for the reason that it had long been the custom to confer such functions upon those courts, and that it must be presumed for that reason that the framers of the Constitution intended to except those courts from the operation of that section of the Constitution providing for the separation of the different departments of government.

At the time the present Constitution was adopted the Railroad Commission had the power to award reparation

to shippers which it now has, and prior to that time it had had authority to make such an award with the force and effect of a judgment. (Gen. Stats., Ed. 1888, p. 1028.) Certainly these provisions in connection with Section 218 of the Constitution conferring upon the Commission powers of a judicial nature show that the framers of the Constitution intended to except the Railroad Commission from the operation of Section 28 of the Constitution, if to confer upon that body such powers as the statute confers upon it might otherwise be regarded as a violation of that section, which, referring to the three departments of government recognized by Section 27, reads as follows: "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Court of Appeals of Kentucky has shown that it is disposed to construe liberally the provisions of the Kentucky Constitution and statutes relating to the Railroad Commission in order to give that body as large powers in the regulation of the railroads of the State as is possible under the Federal Constitution.

In Commonwealth v. Louisville & Nashville R. Co., 120 Ky. 91, in which the court enforced an order of the Commission requiring the operation of trains on one of its branches, the court, by Judge Settle, said:

> "The power to regulate the relative rights and duties of the railroads and the public in this State has, in large measures, been delegated by the Legislature to the Railroad Commission, and the pro-

visions of the statute under which the commissioners acted in this case being reasonable, we can but conclude from the facts disclosed by the record that their determination of the questions presented by the complaint upon which they acted was proper, and for the convenience of the public. Therefore the recommendation made by them should have been obeyed by the railroad companies, but they having failed to do so, appellant could but resort to the courts for relief."

In that case counsel for defendant earnestly argued that the Commission had no power to make the order there sought to be enforced, but the court held that while the power was not expressly conferred by the statute it existed by virtue of the general power of the Commission to see that the laws relating to railroads were enforced.

In Louisville & Nashville R. Co. v. Commonwealth, 106 Ky. 633, the judgment in which was affirmed by this court in Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the court refused to give to Section 218 of the Kentucky Constitution (the long and short haul section) the same construction which had been given by this court to a like provision of the Interstate Commerce Act, but held that the Commission and not the courts must determine whether or not the existence at the long haul point of competition which did not exist at the short haul point was sufficient to entitle the carrier to charge more for the short haul than the long haul, and then held that the provision as thus construed did not violate the Constitution of the United States. The court, by Judge Hobson, said:

"If the railroad companies are not to be allowed to have exclusive control over the rates for the long and short haul and the sole right to determine when competition exists, and to what extent special rates for this reason may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood self-interests have warped and controlled human judgment. However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve, and no principle of constitutional law is violated when the State, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others."

The Kentucky court having given that broad construction to the Constitution it follows that it would hold that the framers of the Constitution in giving the Legislature authority to determine what additional powers the Commission should have did not intend to deny to the Legislature the right to confer upon the Commission any powers of the same general nature.

Another objection urged to the statute is that it makes the Commission both judge and prosecutor by reason of the fact that the Commission after judicially determining that the carrier has been guilty of extortion as a basis of its legislative action then recommends indictments for violations of the law it makes. The Commission does not, however, act as judge in the trial of the prosecutions which it recommends. By Section 218 of the Constitution the Commission is empowered to determine whether

or not a carrier shall be relieved from the operation of the long and short haul law, and by Section 820 of Kentucky Statutes, the Commission has the power to determine whether or not the carrier shall be presecuted for violating that law. The situation as to that matter, therefore, is just the same that it is as to the offense of extortion, and yet the court in Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, upheld those provisions. The carrier can not complain that no indictment can be returned except upon the recommendation of the Commission as that provision is in the interest of the carrier. The recommendation of the Commission is not conclusive. The chances, therefore, that indictments will be returned are less than they would be in the absence of such a provision. The provision that no indictment shall be returned except upon the recommendation of the Commission was approved in McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483.

II.

Rate Order Not in Exess of Power of Commission.

If the statute be valid the question then arises whether or not the rate order of the Commission was within its power. Of course the Commission had no power to violate any right secured to the carrier by the Constitution, but the bill does not allege that the order violates any such right unless the allegation that the order violates the carrier's inherent right to charge "just and reasonable rates" be such an allegation. It is not al-

leged that the orders of the Commission deprive the carrier of its property without due process of law because the rates fixed by the Commission are unreasonably low, but the allegation is that the Commission by reducing rates which were just and reasonable deprived the carrier of its property without due process of law. There is no *direct* allegation that the rates fixed by the Commission are unreasonably low, the only allegation to that effect being found in the statement that the carrier will be restricted to the rates fixed by the Commission, and "although the same are unreasonably low and unjust the complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates."

Just how low the rates fixed by the Commission must be before the court can say that the carrier's rights under the Constitution have been invaded is immaterial here. We think we have clearly shown that the rates must be so low as to be confiscatory before the carrier can be said to be deprived of his property without due process of law, but even if that be not the test the carrier surely must, in order to have relief, allege something more than that the rates fixed are unreasonably low and unjust, for that raises only the question upon which the Commission passed, and if the court should merely determine what would be a reasonable rate for the future it would exercise legislative power. The rates fixed by the Commission might seem to the court to be unreasonably low, but the question might be such a close one that the court would be unwilling to say that the finding of the Com-

mission was so far wrong as to indicate that the Commission was unreasonable. But even if the court passes upon the same question upon which the Commission passed, the rates fixed by the Commission must still be regarded as *prima facie* reasonable, and facts and not mere legal conclusions must be alleged to overcome the presumption in favor of the rates fixed by the Commission. In the case at bar no facts are alleged in the bill to show either that the action of the Commission was unreasonable or that the rates fixed are unreasonably low, and not even an allegation of a legal conclusion that the action of the Commission was unreasonable, the only allegation as to that matter being that "although" the rates fixed by the order complained of are unreasonably low the carrier can not exceed those rates if the order of the Commission goes into effect.

While it is not so alleged in the bill it is argued that the jurisdiction of the Commission depended upon the existence of the fact that the carrier was charging extortionate rates, and that if that fact did not exist the order was void. The fact is, however, that the statute authorizes the Commission to make rates for the future whenever it finds that the carrier has been guilty of extortion, and so it is that finding of the Commission which gives it jurisdiction, whether the finding be correct or not. Counsel argue in effect that even though the court may not have power to inquire whether or not the rates fixed by the Commission are reasonable so long as they are not confiscatory, the court may still inquire whether or not the Commission erred in determining that some change in the

rates fixed by the carrier was proper. In other words, the argument is that even though there may be no inquiry as to the fairness and wisdom of the particular law made by the Commission there may be an inquiry as to whether or not the Commission erred in determining that some law on the subject was necessary. There is as much reason why the finding of the Commission that some law upon the suject as to which it legislates pursuant to legislative authority is proper or necessary should be binding upon the courts as there is that a similar finding of the Legislature should be binding, and there is no reason to suppose that the Legislature did not mean what it said when it provided that the mere finding of the Commission that the carrier had been guilty of extortion should be sufficient to give power to fix a rate for the future regardless of the correctness of that finding.

Even if the existence of the fact, and not merely the finding of the Commission, that the rates charged by the carrier were extortionate was necessary to give the Commission power to fix rates for the future, no facts are alleged in the bill which show that the finding of the Commission that the rates charged were extortionate was erroneous. On the contrary, the fact that the carrier had for many years prior to March, 1910, charged much lower rates than those they were charging at the time of the hearing before the Commission made it incumbent upon the carrier to give a good reason for the change, and it does not appear from its bill that it made any attempt to do so.

Interstate Commerce Commission v. Chicago, etc., R. Co., 209 U. S. 108, 119.
Memphis Cotton Oil Co. v. Illinois Central R. Co., 17 I. C. C. R. 313.

The fact that the lower rates charged prior to March, 1910, were given to distillers alone while the rates fixed by the Commission apply to all shippers is immaterial in the absence of any showing in the bill that any persons other than distillers at the points involved shipped or received the commodities to which those rates applied.

It can not be said that the Commission exceeded its powers by acting arbitrarily or in bad faith, as there is no allegation to that effect. The mere allegation that the evidence heard bore no "proper relation" to the question investigated is but a conclusion of law, and even if its truth should be established that fact would not invalidate the action of the Commission if that body in good faith believed that the evidence did show that the rates ought to be reduced. Besides, the case was heard by the Commission upon written pleadings and some of the material facts were admitted by the carrier. Especially is this true as to the amounts for which reparation was awarded. There may also have been some room for difference of opinion as to the strength of the presumption arising from the fact that the carrier had long maintained lower rates than those being then charged, but that was a question for the Commission alone provided it acted in good faith.

It is insisted further that the Commission went beyond its power in making the order complained of, be-

cause discrimination against other Kentucky points will result if the order is obeyed. It is a complete answer to this proposition to say that the Court of Appeals of Kentucky has held Section 818 of Kentucky Statutes, which is the only statute in Kentucky prohibiting discrimination as between localities, to be void as to the penalties because of uncertainty. (Commonwealth v. Louisville & Nashville R. Co., 20 Ky. Law Rep. 491). Section 817 prohibits a difference in rates only where "like services" are rendered for two persons, and of course the circumstances and conditions of the service rendered in transporting goods between two points are never the same as the circumstances and conditions of the service rendered in transporting the same kind of goods between two other points. For that reason Section 817 does not prohibit discrimination in transportation rates as between localities, that kind of discrimination being prohibited by Section 818. But even assuming that Section 817 does prohibit discrimination as between localities a discrimination resulting from the action of the Commission would not be within the statute. The complainant, therefore, can safely await the further action of the Commission before it changes other rates. If, however, a change in other rates be necessary to avoid discrimination that does not condemn the order, even though a penalty attaches to the failure to make the change. If the mere fact that a change in one rate may necessitate changes in other rates is to prevent the Commission from acting, the only way in which a Railroad Commission can make rates is

to make complete schedules of rates, and to that method of making rates the carrier has very strenuously objected.

The Commission has full power to revoke or modify its orders making rates, and it must be presumed that as other complaints are presented it will so adjust rates as to prevent discrimination as far as it is possible to do so.

Another objection urged to the order of the Commission is that rates will have to be changed to intermediate points to avoid a violation of the long and short haul law. If there are intermediate points to which complainant has been charging higher rates than those fixed for the longer distance points, the Commission has full power under Section 218 of the Constitution to relieve complainant from the operation of the long and short haul law, and it must be presumed that it would do so upon complainant's application if any reason should be shown why complainant should be relieved from its operation as to the points in question. If no such reason be shown the law conclusively presumes that if the rates fixed by the Commission are reasonable, higher rates charged by the carrier for lesser distances included within the greater, are unreasonable.

All of the objections which relate to the readjustment of rates which will become necessary if the order of the Commission is obeyed go to the expediency of the order and not to the power of the Commission, and are answered by what was said by the court in the case of Interstate Commerce Commission v. Ill. Cent. R. Co., 215 U. S. 452, in answer to similar objections made to an order of the Interstate Commerce Commission relating to

the distribution of coal cars. In that case the court, by the present Chief Justice, said:

> "The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a perference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is brought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character, which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in preformance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

Another answer to all objections made to the reasonableness of the rates is that complainant must first present all the facts bearing on the reasonableness of the

rates to the Railroad Commission before resorting to the Federal courts. The statute expressly provides that an order of the Commission fixing rates "may be revoked or modified by an order likewise entered of record." And if the facts alleged in the bill are sufficient to condemn the order of the Commission, the presumption is that if they were presented to that body it would give relief. The allegation of the bill is that the evidence heard by the Commission bore no "proper relation" to the reasonableness of the rates for transporting the supplies and commodities in question when to be used for distilling purposes, but complainant did introduce evidence before the Commission, and there is no allegation that any evidence it offered was rejected. So far as appears, therefore, it deliberately withheld from the Commission the facts it now alleges in its bill, and upon which it asks the court to say that it has been deprived of its property without due process of law. That being true, it can not now ask the court to make any inquiry as to the reasonableness of the rates, or as to the readjustment of rates made necessary by the action of the Commission. Here again the case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210, is in point. There the court held that the carrier must, before resorting to the Federal courts, exhaust its remedies before the legislative bodies established by the State for the fixing of rates, and that, therefore, it must appeal to the Supreme Court of Appeals of Virginia from the order of the Commission, this court holding that the action of that

court upon such appeal would be legislative and not judicial action. The court, by Mr. Justice Holmes, said:

> "The State of Virginia has endeavored to impose the highest safeguard possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that Commission, but by making its decisions dependent upon the assent of the same historic body that is intructed with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States."

It follows from that reasoning that the carrier can not deliberately withhold from the body established by the State to fix the rates all evidence bearing any "proper relation" to the reasonableness of the rates, or tending to show the effect of the order which the Commission is asked to make, and then ask relief upon any other ground than that the statute is void upon its face.

III.

Provision of Charter Fixing Maximum Rates Repealed.

It is conceded by complainant that it now has no irrepealable contract entitling it to charge the rates authorized by its charter, but counsel argue that it has a repealable contract, and that the obligation of that contract has been impaired by the action of the Railroad Commission in reducing complainant's rates when it

was not charging as much as it was authorized by its charter to charge, and when the provision of its charter giving it that authority has never been repealed.

In Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, the court, by the present Chief Justice, commenting upon a proposition similar to that urged here, said:

> "As it is not denied that the asserted charter rights was held subject to the power of the State to repeal, alter, or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 345, 53 L. Ed. 530, 542, 29 Sup. Ct. Rep. 370. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act has impaired a contract without, by the same token, declaring that such act has either repealed, altered, or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract. And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since, whatever be the extent of the right conferred, it was subject to the reserved power."

If the provisions of the charter as to rates could be repealed the only question for the court is whether or not they have been repealed.

Section 573 of Kentucky Statutes, which is a part of the chapter on "Corporations," under which railroad companies are incorporated, reads as follows:

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent, so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

That chapter (Secs. 763-771), defines the powers of railroad corporations and prohibits such corporations from charging more than just and reasonable rates (Section 816), and that chapter also now embraces the McChord Act as Section 820a, which formed a part of that chapter in the 1903 edition of Carroll's Statutes adopted by the Legislature. (Kentucky Statutes, Ed. 1909, Section 2290b.)

Under Section 573, the test as to whether or not the privileges granted by the charter of any railroad corporation have been repealed is the right of any railroad corporation now incorporated to obtain such privileges. The manifest purpose of Section 573 was to place all corporations on an equal footing as to their privileges and immunities, and the complainant having accepted the provisions of the present Constitution as authorized by Section 190 of that instrument, and also the provisions of the Kentucky Statutes relating to corporations, all its special privileges and immunities which it could not acquire if it were now being organized under the existing corporation law stood repealed on September 28, 1897. That no railroad corporation could now acquire the right to charge the maximum rates fixed in complainant's charter is too plain for argument, especially, in view of Section 816 of Kentucky Statutes, prohibiting extortion, and of the McChord Act authorizing the Railroad Commission to fix rates. Even if those statutes did not *ipso facto* repeal the provisions of complainant's charter as to rates, the action of the Commission in fixing rates for complainant pursuant to those statutes operates as such a repeal. The case of Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, holding that complainant could not be regarded as guilty of extortion as long as it kept within the maximum rates permitted by its charter, was decided in 1896, more than a year prior to the time fixed for the repeal of existing charter privileges which could not be acquired under existing laws, and long prior to the time at which complainant accepted the

provisions of the present Constitution and the provisions of the corporation law.

But the argument is that no repealing statute has been passed since complainant accepted the provisions of the new Constitution, and that complainant is not bound by any repealing statute enacted prior to that time.

Section 190 of the Constitution reads as follows:

> "No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

It is manifest that the words "future legislation" were used with reference to the phrase, "the time of the adoption of the Constitution" just preceding them, and the section must mean that any corporation accepting the provisions of the Constitution becomes subject to all legislation enacted after the adoption of the Constitution. Besides, the complainant expressly alleges in its bill that it did accept the existing act regulating corporations, and that was done, no doubt, to obtain the benefit of certain provisions therein.

In Newport and Cincinnati Bridge Co. v. Gill, 21 Ky. Law Rep. 942, the court held that a corporation created prior to the present Constitution could not have the benefit of legislation under that Constitution relating to the condemnation of property without accepting the provisions of that instrument, and clearly assumed that the acceptance of the Constitution would give the corporation the benefit of all existing legislation, from which

it follows that any corporation accepting the present Constitution becomes subject to all existing legislation enacted thereunder, and not subject merely to such legislation as may be enacted after such acceptance.

It would be anomalous if a corporation could escape the burden of adverse legislation by delaying until after its enactment to accept the provisions of the Constitution, and then obtain the benefit of favorable legislation by accepting the Constitution in anticipation of the enactment of such legislation.

Counsel argue, however, that the Court of Appeals of Kentucky has held that the provisions of complainant's charter requiring it to make farm crossings are still in force, and that if it must bear the burdens imposed by its charter it is entitled to the privileges of its charter. But it was only the "powers, privileges or immunities" of corporations which could not be acquired under existing laws which were to stand repealed, and not the burdens imposed. The court held in Louisville & Nashville R. Co. v. Robbins, 111 S. W. 283, that rights of way might have been donated in consideration of the provision of the charter requiring farm crossings, and that it could not, therefore, have been intended to relieve the corporation of such burdens imposed by its charter. Besides, there seems to be no reason why a railroad corporation organized under the existing law might not embrace in its charter a provision imposing upon itself such a burden if it should elect to do so.

Thus far we have assumed that the complainant up to the time it accepted the provisions of the present Consti-

tution had an irrepealable contract giving it the right to charge the maximum rates fixed in its charter, but that it did not have such a contract seems clear.

Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174.
Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, 517.
Winchester, etc., Turnpike Road Co. v. Croxton, 98 Ky. 739.

If the complainant did not have an irrepealable contract when the Constitution was adopted, then it became subject at once to all legislation enacted thereunder.

IV.

Order of Commission Not a Regulation of Interstate Commerce.

It is also contended that the order of the Commission, although it is expressly confined to specific intrastate rates, is a regulation of interstate commerce, for the reason that the rates to which it relates enter into and form a part of certain interstate rates set forth in a tariff filed with the Interstate Commerce Commission, and that a reduction of the intrastate rates will make it necessary to lower interstate rates. There is nothing in the bill to show that a reduction of the intrastate rates will necessitate a reduction of interstate rates. The rules of the Interstate Commerce Commission relating to the filing of intrastate tariffs are set out in the bill, and it is alleged that complainat's existing local rates in

Kentucky enter into and form part of its through rates set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910. It is further alleged that points on the north bank of the Ohio River have always had the benefit of the same rates to interior points in Kentucky that points immediately opposite on the south bank of the river have received to the same interior points, and that under the order complained of Louisville, on the south bank of the Ohio River, will have lower rates to interior points in Kentucky than New Albany and Jeffersonville, Indiana, immediately opposite on the north bank of the river, will have to the same points, and that Covington and Newport, Kentucky, on the south bank of the river, will have lower rates to interior points in Kentucky than Cincinnati, Ohio, immediately opposite on the north bank of the river, will have to the same interior points, and that discrimination will thus result against the points on the north bank of the river. It is also alleged that rates from the North through the Louisville and Cincinnati crossings to interior points in Kentucky are formed by adding to the rate to the Ohio River the rate south of the river, and that any change in the rate south of the river will necessitate a change of the through rate, if discrimination is to be avoided.

Assuming for the present that such discrimination will result unless the interstate rates are reduced the question arises as to whether or not that discrimination or a reduction of rates made to avoid such discrimination will result so directly from the order of the Ken-

tucky Railroad Commission as to make that order an unauthorized regulation of interstate commerce.

For the purpose of government regulation commerce is divided into three parts. Of one part the States have exclusive jurisdiction, of another part Congress has exclusive jurisdiction and of a third part the States have jurisdiction in the absence of regulation by Congress.

In Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, in an opinion by Mr. Justice Brown, the court held that the Kentucky Act of March 21, 1890, fixing rates of toll and fare over the bridge of the Cincinnati and Covington Bridge Company spanning the Ohio River, and connecting the States of Ohio and Kentucky, was an attempted regulation of interstate commerce which it was not within the power of the State to make. The court said:

> "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of regulation by Congress; third, those in which the action of Congress is exclusive and the States can not interfere at all. The first class, including all that wherein the States have plenary power and Congress has no right to interfere, concerns the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is no remote that it can not be termed in any sense an interference."

That each State has exclusive jurisdiction to regulate the transportation of goods wholly within its borders has

been so often decided by this court that it is no longer an open question.

In Gibbons v. Ogden, 9 Wheaton 1, the court, by Mr. Chief Justice Marshall, said (194):

> "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

In The Daniel Ball v. United States, 10 Wall. 557, the court by Mr. Justice Field, said (564):

> "There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States, with foreign nations, and among the Indian tribes.' This limitation necessarily excludes from Federal control all commerce not thus designated and of course that commerce which is carried on entirely within the limits of the State, does not extend to or affect other States."

In Western Union Telegraph Co. v. Texas, 105 U. S. 460, the court, in an opinion by Mr. Chief Justice Waite, said:

> "The rule that the regulation of commerce which is confined exclusively within the jurisdiction and

territory of a State, and does not affect other nations or States or Indian tribes, that is to say, the purely internal commerce of the State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes, belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States from one place to another exclusively within its own jurisdiction will not be repugnant to the Constitution of the United States."

As to that part of commerce of which the State has exclusive jurisdiction its control is as full and complete as is the control of Congress over that part of commerce of which it has exclusive jurisdiction.

In Sands v. Manistee River Improvement Co., 123 U. S. 288, in which it was held that the State could improve its rivers and require persons engaged in interstate commerce to pay tolls for their use as thus improved, the court, by Mr. Justice Field, said:

> "The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."

In Missouri Pac. R'y Co. v. Larabee Flour Mills Co., 211 U. S. 612, the court held that the State of Kansas had the power to compel a carrier by mandamus to perform a common law duty as to the transfer of cars loaded with interstate traffic, in the absence of any action by the

Interstate Commerce Commission. In an opinion by Mr. Justice Brewer, the court, after stating the facts, said:

> "The roads are, therefore, engaged in both interstate commerce and that within the State. In the former, they are subject to the regulation of Congress; in the latter, to that of the State; and to enforce the proper relation between Congress and the State, the full control of each over the commerce subject to its dominion must be preserved."

In Allen v. Pullman's Palace Car Co., 191 U. S. 171 (180), in which the court held that the Pullman Company could not complain of being taxed for the privilege of doing a local business which it was free to renounce, the court by Mr. Justice Day said:

> "It is not necessary to review the numerous cases in this court in which attempts by the States to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the State to tax and control the internal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness."

The Employer's Liability Cases (Howard v. Ill. C. R. Co., 207 U. S. 463) illustrate the care with which this court has guarded the right of the States to control that commerce which is purely internal. In those cases the act of Congress regulating the liability of interstate carriers for injuries to their employes was held to be void because the act was not restricted to those employes who might

be engaged in interstate commerce at the time they were injured, the court holding that the States alone had the right to regulate the liability of interstate carriers for injuries to employes engaged in intrastate commerce alone at the time they were injured.

In New York, *ex rel.*, Pennsylvania R. Co. v. Knight, 192 U. S. 21 (26), the court held that the State of New York could impose a tax upon the cab service of the Pennsylvania Company in New York City, although that service was intended to promote the company's interstate business. After stating that the mere fact that a part of a carrier's business is interstate transportation does not relieve the carrier from State regulation, the court, by Mr. Justice Brewer, said:

> "So the Pennsylvania Company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service which is wholly performed within the State, and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States, a like separation may be recognized between the control of the State and that of the nation."

In County of Mobile v. Kimball, 102 U. S. 691, the court, after saying that "commerce among the States" strictly considered, consists in intercourse and traffic, said:

> "Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to

legislation upon subjects which are merely auxiliary to commerce."

While the power to regulate commerce embraces the power to regulate the mere auxiliaries of commerce, yet those things which are merely auxiliary to commerce are not commerce, although in defining "commerce" they are sometimes included in that term. Either the State or Congress has exclusive jurisdiction of commerce strictly considered. If the commerce is not wholly within one State, Congress has exclusive jurisdiction, but if it is wholly within one State it is within the exclusive jurisdiction of the State. As to those subjects which are merely auxiliary to interstate commerce the State has jurisdiction until Congress acts.

That we are dealing in the case at bar with a regulation of commerce strictly considered, and not with a regulation of a mere auxiliary of commerce, will hardly be disputed.

In Pabst Brewing Company v. Crenshaw, 198 U. S. 17 (30), the court stated with emphasis the rule that a State regulation does not violate the commerce clause if interstate commerce is only indirectly affected by the regulation. In that case the court upheld a statute of the State of Missouri imposing an inspection fee upon malt liquors shipped from other States into that State, and in answer to the objection that the statute was a regulation of interstate commerce the court, by the present Chief Justice, said:

"Conceding, it is argued, that the Missouri statute attached to the liquor after delivery at its destination in Missouri, nevertheless, as the burdens which the statute imposed were of such a character as to affect traffic in the article, and hence operated to deter shipments into Missouri, therefore the statute must be treated as if it bore upon the liquor while still in transit as a subject of interstate commerce. This proposition simply amounts to contending that the Wilson act should be disregarded, since to enforce it would give the States power to regulate interstate traffic in liquor. If, when a State has but exerted the power lawfully conferred upon it by the act of Congress, its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor; yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious workings of our constitutional system has been made possible."

When it has once been determined that a certain part of commerce is within the exclusive jurisdiction of the State the validity of any regulation of that commerce by the State can not depend upon its effect upon interstate commerce. The effect upon interstate commerce of a regulation of purely internal commerce can not be other than indirect, and it is only that regulation which directly affects interstate commerce that is prohibited to the

States. The test is not the extent to which interstate commerce may be affected by the exercise of the power, but whether the effect results directly or results indirectly from the exercise of the power. The indirect effect upon interstate commerce which is not sufficient to invalidate a State regulation may sometimes be more serious or vital than the direct effect upon such commerce of some other State regulation which would be sufficient to invalidate that regulation. The extent to which interstate commerce is affected becomes important only where Congress has jurisdiction, and the question is whether or not the State in the exercise of its police power has trespassed upon that jurisdiction. If interstate commerce is not substantially burdened in such cases the power of the State is not taken away, although interstate commerce be directly affected. The State has power to make all proper regulations for the protection of the public, unless the power has been given to Congress, and so the inquiry is whether or not Congress has power over the subject, the State having the power if Congress has not. Congress has not jurisdiction over intrastate rates and therefore the State must have power to regulate those rates, without regard to the effect of such regulation upon interstate commerce. Whether or not Congress has power over the whole subject-matter can not depend upon the effect of the regulation made by the State, as that must be determined before the State acts. If it is determined that Congress has jurisdiction over the subject-matter then arises for the first time the question as to whether or not the State

has by its regulation substantially burdened interstate commerce. If it has not, the regulation is valid even though interstate commerce be directly affected, but interstate commerce must be directly affected before any question as to the extent of the burden can arise. The cases in which the validity of the State regulation has been made to depend upon the extent of the burden upon interstate commerce or upon the necessity for imposing the burden upon interstate commerce have usually been cases involving regulations affecting subjects merely auxiliary to commerce, or instruments or vehicles of commerce, a long list of such cases being given by Mr. Justice Brown, speaking for the court, in Cleveland, etc., R. Co. v. Illinois, 177 U. S. 514.

In Houston, etc., R. Co. v. Mayes, 201 U. S. 321, the court very clearly drew the distinction which we are here insisting upon. In that case the court, by Mr. Justice Brown, said:

> "As the power to build and operate railways, and to acquire land by condemnation, usually rests upon State authority, the Legislature may annex such conditions as they please with regard to intrastate transportation, and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

This court has repeatedly held that the regulation of rates for the transportation of goods wholly within a single State is a regulation of internal commerce; and that the fact that such regulation by the State affects interstate commerce does not render it invalid. In Stone

v. Farmers' Loan & Trust Co., 116 U. S. 307, the court, by Mr. Chief Justice Waite, referring to the State of Mississippi, said:

> "It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."

In Wabash, etc., Railroad Co. v. Illinois, 118 U. S. 557, the court, by Mr. Justice Miller, after stating that it was bound by the decision of the Supreme Court of Illinois holding that the long and short haul statute of that State applied to interstate transportation as well as intrastate transportation, said:

> "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it is certainly the province of the State Legislature to determine that question."

In Smyth v. Ames, 169 U. S. 446, the court, by Mr. Justice Harlan, at page 521, said:

> "It can not be doubted that the making of rates for transportation by railroad corporations along public highways between points wholly within the limits of a State is a subject primarily within the control of that State."

In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, at page 519, the court, by Mr. Justice Shiras, said:

> "It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a State."

The court, as it had previously done in Munn v. Illinois, 94 U. S. 113, there recognized the fact that the State in regulating the intrastate rates of carriers merely exercises a part of its police power, and that is made clearer still by the fact that the court cited the case of Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, as a complete answer to the objection that the regulation of intrastate rates complained of was a regulation of interstate commerce, the court having held in the case cited that the State, in the exercise of its police power, had power to prohibit the consolidation of parallel and competing roads in the State although they formed parts of interstate lines.

In Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579, the court held that the fact that the Supreme Court of North Dakota had construed a statute of that State fixing coal rates as applying only to transportation wholly within the borders of the State disposed of the objection that the statute was a regulation of interstate commerce.

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, and also in Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, the court assumed that the State had power to make complete schedules of intrastate rates for interstate carriers, although the court must have taken judicial notice of the fact that the existing relation between interstate rates and intrastate rates would be violently disturbed by such a regulation, and yet it is manifest that the effect upon interstate commerce of such a regulation of rates must be much greater than that which would result from the few changes in rates made by the order of which appellant complains.

In Siler v. Louisville & Nashville R. Co., 213 U. S. 199, in which the validity of complete schedules of rates made by the Railroad Commission of Kentucky was involved the court in support of its conclusion that the statute did not confer power upon the Commission to make schedules of rates did not suggest that to give the Commission that power would necessarily give it power to regulate interstate commerce, and yet as the schedules involved in that case made a sweeping reduction of rates it is clear that they would have much more substantially burdened interstate commerce than would the reduction of rates on distillers' supplies to and from a few points.

In Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257, in which a regulation of coal rates from Duluth to interior points of Minnesota was involved, there was no suggestion that the State had trespassed upon the jurisdiction of Congress, and yet the effect upon interstate

rates of such a regulation must have been quite as great as that of the regulation of which the appellant is here complaining.

In determining what is withdrawn from State regulation by the commerce clause, leaving out of view that part of commerce of which the States have jurisdiction only until Congress acts, the subjects of legislation are divided into two classes. Interstate commerce, including all its auxiliaries, constitutes one class, and every thing that is not interstate commerce constitutes the other class. Intrastate transportation, therefore, does not constitute a separate class, but is classed with everything else that is not interstate commerce, and the State has as complete control of that branch of commerce as it has of every other subject of legislation that is purely internal.

If the State did not have exclusive jurisdiction of intrastate rates we would have a case where the State would at least have jurisdiction until Congress should act, as it is quite certain that Congress has not exclusive jurisdiction. It is only where its power is exclusive that the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction.

Leisy v. Hardin, 135 U. S. 100.
Wilkerson v. Rahrer, 140 U. S. 545.

And even as to some matters as to which the power of Congress when exercised is exclusive any action taken by the State must be respected until Congress intervenes.

In Missouri, etc., R. Co. v. Haber, 169 U. S. 613, involving the validity of a State regulation as to diseased cattle, the court, by Mr. Justice Harlan, said:

> "Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which in their application may at times bear upon the same subject, no collision that would disturb the harmony of the national and State governments, or produce any conflict between the two governments in the exercise of their respective powers, need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the State legislation may refer."

In the same case the court, after reviewing previous decisions, said:

> "These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes."

In Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, the court held that a statute of the State of Ohio requir-

ing each railroad company operating a railroad in the State to stop at least three trains each day at each station of over 3,000 inhabitants was not a regulation of interstate commerce as applied to the trains of a railroad company engaged in such commerce, although all the trains of the company might carry interstate passengers. In answer to the argument that such legislation does not come within the police power of the State, because it does not affect the public health, morals or safety, and that it is only in the exercise of the police power that legislation affecting interstate commerce may be enacted by the State, the court, by Mr. Justice Harlan, said:

> "It may be that such legislation is not within the 'police power' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental, or legislative, exists in each State, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general government."

The rates which a carrier must charge depends to a large extent upon his liability for losses occurring in the course of transportation, and yet the State may fix that liability as to interstate shipments in the absence of legislation by Congress as to that matter, as held in Pennsylvania R. Co. v. Hughes, 191 U. S. 477. In that case, the court by Mr. Justice Day, said (p. 488):

> "It is well settled that the State may make valid enactments in the exercise of its police power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

In Northern Securities Co. v. United States, 193 U. S. 197, the court merely held that Congress might prohibit State corporations from carrying out the purposes of a combination formed in restraint of interstate commerce. The court, by Mr. Justice Harlan, said (p. 350):

> "Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.*"

The italics were used by the court, and show that there is no room for conflict between the Federal government and a State government where a State regulation applies only to transportation within its borders, and the Congress has made no attempt to regulate such transportation, it matters not how much interstate commerce may be affected.

In Missouri Pac. R'y Co. v. Larabee Flour Mills Co., 211 U. S. 612, already cited on another point, the court held that even though Congress has conferred power upon the Interstate Commerce Commission to regulate the transfer of cars loaded with interstate traffic the State could by mandamus compel a carrier to perform a common law duty as to such transfer, the Interstate Commerce Commission having made no regulation affecting the matter.

That Congress has disclaimed any intention to regulate intrastate rates seems clear.

In Missouri Pac. R'y Co. v. Larabee Flour Mills Co., *supra,* the court, after declaring that Congress and the State must each have full and complete control over that part of commerce subject to its dominion, said:

> "How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the 1st section of the interstate commerce Act of February 4, 1887 (24 Stat. at L. 379, Chap. 104, U. S. Comp. Stat. 1901, p. 3154), as well as in that of June 29, 1906 (34 Stat. at L. 584, Chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 893), for each provides:
>
> "'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country, from or to any State or territory, as aforesaid.'"

In Saunders & Co. v. Southern Express Co., 18 I. C. C. R. 415, the Interstate Commerce Commission, at p. 422, said:

"While we have full authority, upon certain principles and within certain limits definitely fixed in the amended act, to deal with interstate rates, it is expressly provided in Section 1:

" 'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or territory as aforesaid:

" 'This language seems to have but one meaning, and that is that, although the Congress constitutionally may give and in fact has given to the national Commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely State traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order the purpose of which is directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama Commission.' "

Although Congress, when that decision was rendered, was considering the amendment of June 18, 1910, to the Interstate Commerce Act, it amended Section 1 of that act without changing the language quoted by the Interstate Commerce Commission, thus again deliberately leaving to the States absolute control of intrastate rates, as we believe it was bound to do under the Constitution.

While Congress can neither delegate its own powers nor enlarge those of a State, yet it may adopt as its

own the law of a State provided the law be one which it would have been competent for it to enact.

Wilkerson v. Rahrer, 140 U. S. 545.

Therefore, the express declaration of Congress that the Interstate Commerce Act shall not apply to the transportation of property wholly within one State must be regarded as the adoption by Congress of any regulation of intrastate rates made by a State, if Congress had any power over the subject, which we deny. The States had long exercised the power to regulate intrastate rates, and Congress, if it had any control over such rates, could not have intended to leave them altogether unregulated merely because their regulation might affect interstate commerce.

In Smith v. Alabama, 124 U. S. 465, in which the court held that a statute of Alabama requiring locomotive engineers to be examined and licensed was not a regulation of interstate commerce, the court, by Mr. Justice Matthews, said:

> "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which, until displaced, covers the subject."

But it is said that Congress has acted as to intrastate commerce to the extent of prohibiting any discrimination against interstate shipments in favor of intrastate shipments, and that the State regulation here complained

of requires the carrier to lower its interstate rates in order to avoid such discrimination. We deny that Congress either has the power to prohibit the granting of favors to intrastate shipments as against interstate shipments or has attempted to exercise that power.

In Louisville & Nashville R. Co. v. Eubank, 184 U. S. 27, the court held that the State could not prohibit a carrier from discriminating in favor of interstate shipments as between intrastate shipments and interstate shipments. For the same reason Congress has no power to prohibit a carrier from discriminating in favor of intrastate shipments as between intrastate shipments and interstate shipments. If the carrier elects to give free transportation of freight or passengers from one point to another in the same State that is a matter of which Congress can not complain. A carrier conducting both an interstate business and an intrastate business is to be regarded as two separate carriers so far as the government regulation of rates is concerned.

In Kehrer v. Stewart, 197 U. S. 60, a statute of the State of Georgia upholding a tax of $200 upon resident managing agents of non-resident packing houses was upheld, regardless of the fact that the greater portion of the business was interstate in character. The validity of the statute being made to depend upon whether or not the domestic business was a mere incident to the interstate business, the court, by Mr. Justice Brown, said:

> "There could be no doubt whatever that, if the agent carried on his interstate and domestic busi-

> ness in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment."

In determining whether or not intrastate rates are so low as to be confiscatory, revenues from interstate business are not to be considered, and in determining whether or not interstate rates are so low as to be confiscatory revenues from intrastate business are not to be considered.

Smyth v. Ames, 169 U. S. 466.

It follows, therefore, that a carrier can not recoup his losses on intrastate business by increasing interstate rates beyond what would otherwise be reasonable. If because of losses on intrastate business the carrier could maintain interstate rates which would otherwise be unreasonably high, it might plausibly be argued that Congress has power to prohibit discrimination in favor of intrastate traffic as against interstate traffic, but the fact is that interstate business and intrastate business are completely separated in determining whether or not intrastate rates are confiscatory, and that fact emphasizes the exclusive jurisdiction of the State over intrastate rates.

Where discrimination results from an undue difference in two rates, and both rates are under the control of the same government, the carrier may be required to remove the discrimination by either lowering the higher

rate or raising the lower rate, but where the one rate is under the control of the State and the other is under the control of Congress that can not be done. For the purposes of regulation the carrier is a separate and distinct person as to each rate and therefore neither the State nor Congress can require such an election. The interstate carrier and the intrastate carrier can not be required to elect whether one of them will raise a certain rate or the other will lower a certain other rate. Therefore, the remedy of the government controlling the higher rate must be to compel a reduction of that rate. In that way discrimination may be prevented although it may not be prohibited. If intrastate rates are too high intrastate shippers can not be protected unless the State has power to reduce those rates. It may be argued that the Interstate Commerce Commission and the Kentucky Railroad Commission may never agree as to the relation which interstate rates and intrastate rates ought to bear to each other, and that each time one of them requires a reduction of the rates which it controls the other will require a corresponding reduction in the rates it controls, thus pressing both intrastate rates and interstate rates down to a point where the carrier can not live. The Interstate Commerce Commission, however, does not accept the rates made by a State Commission as the absolute measure of fair interstate rates, and sometimes refuses to reduce interstate rates even though they may be too high as compared with the rates fixed by the State as maximum rates. But even if that were not true neither intrastate rates nor interstate

rates can be made so low that they will not yield the carrier a fair return.

Since Congress has complete control of interstate rates, it follows that it is not necessary for the protection of interstate shippers that Congress should have the power to prohibit discrimination as between interstate shipments and intrastate shipments, its power to require a reduction of interstate rates being all that is necessary for that purpose.

But even if Congress has power to prohibit discrimination in favor of intrastate commerce it has not attempted to exercise that power.

By Section 1 of the Act to Regulate Commerce it is expressly provided, as we have seen, that the provisions of that Act shall not apply to the transportation of property wholly within a single State.

Section 2 forbids discrimination in the transportation of persons or property "subject to the provisions of this Act."

Section 3 forbids any common carrier "subject to the provisions of the Act" to grant any undue or unreasonable preference to any person or locality or any particular description of traffic, which must mean, of course, any traffic subject to the provisions of the Act.

Section 4 declares that it shall be unlawful for any common carrier subject to the provisions of the Act "to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of the Act."

That language shows conclusively that Congress did

not intend to prohibit discrimination in favor of intrastate shipments as against interstate shipments, "the intermediate rates subject to the provisions of this Act" being only intermediate interstate rates.

Again, Section 1 prohibits the issuing of "interstate" free tickets or passes, thus showing the care of Congress not to attempt to prohibit favors to intrastate passengers or shippers.

But if it be conceded for the sake of the argument that Congress has power to prohibit carriers from granting to intrastate shippers favors which they do not grant to interstate shippers, and that it has exercised that power, it does not follow that the order of the Railroad Commission here complained of was beyond its jurisdiction. The State still has power to regulate intrastate rates subject to the limitation that its regulations shall not make it necessary for the carrier to discriminate against interstate shipments. A discrimination in rates may ordinarily be obviated either by raising the lower rate or lowering the higher rate. Where the State, however, has fixed the lower rate as the maximum, the discrimination can be obviated only by lowering the higher rate, and that being an interstate rate, the argument is that the fixing of the lower rate by the State is necessarily a regulation of interstate commerce because it necessitates the lowering of the higher interstate rate, if discrimination is to be avoided. Under the Act to regulate Commerce, however, the carrier is not subject to any penalty for discrimination until the Interstate Commerce Commission has determined

that a rate is discriminatory. The published interstate rate is the only legal rate until the Interstate Commerce Commission determines otherwise, and no action of the State can make that rate illegal.

Texas & Pac. R'y Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

But it does not follow because the carrier is required to adhere to the rate he has published until it has been changed by the Interstate Commerce Commission that there is any presumption of law that the published rate is reasonable. There is simply no extortion or discrimination which may be punished until the Interstate Commerce Commission has acted. Therefore, it is for the Interstate Commerce Commission to say whether or not the interstate rate must be lowered. If a reduction of the interstate rate should be required it would be because of extortion and not because of discrimination, as the reduction of an intrastate rate in obedience to a State regulation could not be made the basis of a charge of discrimination. If the fact that a State regulation of intrastate rates brings about an undue disparity between interstate rates and intrastate rates deprives the State of the power to make the regulation, then the State can never regulate intrastate rates where both interstate rates and intrastate rates are too high, but at the same time bear the proper relation to each other, as any reduction of either must result in an undue disparity between them.

If interstate rates are lowered to avoid a discrimination prohibited by the Act of Congress it can

not be said that such a reduction of interstate rates results from the action of the State in compelling the carrier to reduce its local rates. Indeed, if Congress has left the regulation of intrastate rates to the State and then provided, as counsel claim, that interstate rates shall not be relatively higher than intrastate rates, it follows that Congress authorizes the application to interstate shipments of such intrastate rates as the State may prescribe, or at least adopts such rates as the standard of interstate rates. And, as we have already seen, Congress may adopt as its own any law or regulation of a State provided the law or regulation be one which it would have been competent for Congress to enact.

But even if Congress be not regarded as adopting State regulations any regulation by the State which tends to compel the carrier to lower its interstate rates is in aid of interstate commerce and not a burden upon that commerce so long as the carrier is not compelled to make its interstate rates so low as to be confiscatory. If every regulation which reduces a carrier's revenues is a burden upon the carrier it is not every regulation which thus burdens an interstate carrier that is a burden upon interstate commerce. Some burdens of that kind upon interstate carriers are necessary to the freedom of such commerce. A tax upon interstate commerce is always a burden upon that commerce, but a reduction of rates is quite a different thing.

One of the objects of laws prohibiting railroad companies from buying competing lines is to prevent extor-

tionate rates, and yet in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, the court held that such a law was a valid exercise of the police power of the State, although the effect was to require the railroad company to submit to competition which would probably reduce its revenues from interstate business.

Just what effect the reduction of intrastate rates required by the order complained of will have upon interstate rates remains to be seen. The appellant alleges that it will be compelled either to reduce its interstate rates or to discriminate against its interstate traffic, but it is for the Interstate Commerce Commission to determine whether or not the interstate rates must be reduced. If the appellant should reduce its interstate rates without being compelled by law to do so it must be regarded as doing so voluntarily, and it is not at all certain that it would elect to do so. It is impossible to know what the Interstate Commerce Commission will require. If that Commission should require the appellant to lower its interstate rates it would do so because it had found those rates to be extortionate. If it should be willing to accept the intrastate rates fixed by the Kentucky Railroad Commisesion as the measure of fair interstate rates and for that reason require a reduction of the interstate rates that would not invalidate the State regulation, as such a reduction would result from the action of the Interstate Commerce Commission and not from the action of the State through its Railroad Commission. While the Interstate Commerce Commission has adopted a rule de-

claring a through rate which is greater than the sum of the locals to be *prima facie* unreasonable, the Commission does not regard itself as bound to accept a rate made by a State Railroad Commission as the measure of a fair interstate rate, and does not hold the carrier responsible for discrimination resulting from a reduction of intrastate rates in obedience to State authority.

> In the matter of freight rates between Memphis and Arkansas points, 11 I. C. C. R. 180.
> Hope Cotton Oil Co. v. Texas & Pac. R'y Co., 12 I. C. C. R. 265.
> Saunders & Co. v. Southern Express Co., 18 I. C. C. R. 415.

Therefore, the Interstate Commerce Commission is quite as free to regulate interstate rates after the State has limited intrastate rates as it was before, and whatever regulation it may make will be purely voluntary. If that Commission should conclude that in no case ought an interstate carrier be permitted to charge as a through interstate rate more than the sum of the local intrastate rates, and should make a rule to that effect, any change in interstate rates which might become necessary in order to conform to that rule would result from the action of the Interstate Commerce Commission and not from the action of the Kentucky Railroad Commission in limiting the local intrastate rates.

In Louisville & Nashville R. Co. v. Eubank, 184 U. S. 27, the court held the Kentucky long and short haul law to be void as a regulation of interstate commerce to

the extent that it prohibits the charging of more for a short haul than a long haul, where the long haul is an interstate haul, and thus declared that the State may not prohibit an interstate carrier from discriminating in favor of interstate shipments. In that case, however, the court said:

> "It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several States for the parts of the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the State over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce; and if not, how can it be held an interference by the State when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.
>
> "In the case supposed the States have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective State rates already, or from time to time, adopted by the State. In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand, the State by such a statute regulates the local rate, but that it has the right to do. Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate."

That reasoning seems conclusive of this question. The most that can be claimed for appellant here is that under

the Act of Congress its through interstate rate can not be more than the sum of the locals, and that any change made by the State in the locals means a change in the interstate rate. But the action of the State would be the occasion and not the cause of the change in interstate rates. The real cause of that change, if it should be made, and should not be purely voluntary, would be the action of the Interstate Commerce Commission in accepting the local rates as the measure of interstate rates.

Another reason urged in support of the argument that the order complained of is a regulation of interstate commerce is that as interstate rates are formed by combinations of intrastate rates, and intrastate tariffs are filed with the Interstate Commerce Commission in compliance with regulations of that body, a change of intrastate rates necessarily means a change of interstate rates and a change of tariffs filed with the Interstate Commerce Commission. The regulations of the Interstate Commerce Commission, however, do not require carriers to base their interstate rates upon their intrastate rates, and a carrier can not by voluntarily electing to do so confer upon the Interstate Commerce Commission a power which it would not otherwise have. Besides, if the power of the State to regulate intrastate rates depended upon whether or not interstate rates were made by combining intrastate rates it would be within the power of the carrier to withdraw all intrastate rates from regulation by the State, and the power of the State would depend upon the form of the carrier's tariffs.

In New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission, 200 U. S. 361, the court, by the present Chief Justice, said:

> "Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary."

Even if the carriers were required by the Interstate Commerce Commission to base their interstate rates upon their intrastate rates the change in interstate rates which would be necessary by reason of the change of intrastate rates would result from the action of the Interstate Commerce Commission and not from the action of the State.

There is nothing to distinguish this case from any other case involving a regulation by the State of a few intrastate rates.

It is alleged that the points on the north bank of the river now have the same rates to interior points in Kentucky that the points on the south bank of the river have to the same interior points, and that they are entitled to the same rates, but no reason is given why they are entitled to the same rates. Whether or not they ought to have the same rates is for the Interstate Commerce Commission to determine.

If it be an injustice for Covington to have lower rates to interior Kentucky points than Cincinnati has, the injustice is one that either the carrier or the Interstate Commerce Commission may remove. But if the carrier should refuse to lower rates from Cincinnati and the Interstate Commerce Commission should determine that the carrier ought not to be required to lower those rates, then such injustice or inconvenience as might result would be one of the unavoidable effects of our dual form of government.

In New York, etc., R. Co. v. State of New York, 165 U. S. 628, in which the court upheld a New York statute relating to the heating of passenger cars the court, by Mr. Justice Harlan, in answer to the argument that conflicting State regulations of that character would be a hardship upon travel that could not be endured, said (pp. 632-633):

> "These possible inconveniences can not affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character can not be avoided so long as each State has plenary authority within its territorial limits to provide for safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground."

It is alleged further that the present interstate rates through the Louisville and Cincinnati crossings are made

up of the rate to the Ohio River plus the rate south of the river, and if the through rate continues to be the sum of those rates as they now exist and the rate south of the river is reduced the through rate will be greater than the sum of the locals. A through rate is not *per se* unreasonable or discriminatory because it is greater than the sum of the locals. By a regulation of the Interstate Commerce Commission, quoted by complainant in its bill (Record, p. 115), the burden of proof is upon the carrier to defend a through rate which is greater than the sum of the locals, the Commission thus recognizing the fact that such a rate may be defended. Whether the difference between the existing through rate and the sum of the locals, as that sum will be when the Kentucky rates are reduced, will be so great as to make the through rate unreasonable can not be determined upon the facts which now appear. The question as to whether the Kentucky Railroad Commission or the Interstate Commerce Commission had jurisdiction to regulate the rates which the Kentucky Railroad Commission undertook by the order complained of to regulate can not depend upon what the carrier may have done in the past, or upon what changes it may have to make in its existing rates. If the carrier had lowered its interstate rates just before the order of the Railroad Commission was entered the jurisdiction of the Commission would not have been affected. The real basis of the objection urged, therefore, is not that the carrier is compelled to change interstate rates, but that its freedom of action as to interstate rates is restrained. If it is now necessary for the car-

rier to lower interstate rates to avoid discrimination, it follows that if, prior to the order of the Commission, it had already lowered interstate rates, it would, as a result of that order, have been denied the right to increase them, and thus the order of the Commission would have restrained its freedom of action just as effectually as it does under existing conditions.

If intrastate rates should be too high as compared with interstate rates and the State should require the carrier to reduce its intrastate rates just enough to avoid discrimination, a subsequent increase of the interstate rates would bring about a discrimination against interstate commerce, and it would be quite as reasonable to say that this discrimination is due to the barrier which the State regulation interposes to the increase of the intrastate rates, as it is to say that a reduction of intrastate rates causes a discrimination against interstate rates where the disparity results at the time the intrastate rates are reduced. In the one case the disparity results from the refusal of the carrier to reduce interstate rates and in the other the disparity results from the voluntary increase by the carrier of interstate rates. And it may be just as important for the carrier in the one case to increase his interstate rates as it is for him to maintain his existing interstate rates in the other case.

It is clear, therefore, that the question as to whether the regulation of a certain part of commerce is within the jurisdiction of the State or within the jurisdiction of Congress can not depend upon what change the carrier may be required to make in his existing arrangements in

order to comply with, or as a result of, that regulation. And it is also clear that if the carrier is entitled to have his freedom of action as to interstate rates wholly unrestrained by the State, there can be no regulation of intrastate rates by the State, since every regulation of intrastate rates must restrain the carrier to some extent in fixing interstate rates.

It is argued that even though a change of interstate rates is not necessary in order to avoid a violation of the law, such a change is made necessary by competition between interstate rates and intrastate rates, shipments being made to the State line on local bills of lading and then reshipped in order to obtain the benefit of local rates in all cases in which the through rate exceeds the sum of the locals. If the question were an open one such an argument might be pertinent to show that local regulation of interstate carriers is no longer feasible, and that all regulation should be national, but it being conceded that the State may, in some cases, regulate rates for transportation wholly within the State, such an argument is not pertinent to show that the particular regulation here complained of is a regulation of interstate commerce. Let us suppose two railroads parallel to the main line of the appellant, the one extending from Louisville to the Tennessee border and the other from the Tennessee border to Nashville, Tennessee, and that the through rates of appellant from Louisville to Nashville had been made to equal exactly the sum of the locals on the two intrastate roads. Let us suppose further that the Railroad Commission of Kentucky should reduce the rates on the

Kentucky road, thus reducing the sum of the locals and necessitating a reduction of appellant's through rate to meet the competition of the local roads. Surely learned counsel for appellant would not contend that the action of the State in reducing the rate on the local road was a direct regulation of interstate commerce, because the appellant, in order to meet the competition, must reduce its interstate rate. And yet there can not be any difference in principle between that case and the case at bar. The power of the State to regulate intrastate rates is not limited by the fact that the carrier is engaged in interstate commerce as well as in intrastate commerce, and any regulation of intrastate rates which is valid as applied to a carrier engaged in intrastate commerce alone is equally valid when applied to a carrier engaged in both intrastate commerce and interstate commerce.

The case of Gulf, etc., R'y Co. v. Texas, 204 U. S. 403, involved the rate upon a shipment of corn purchased from the Hardin Grain Company of Kansas City, Missouri, for delivery on railway track at Goldthwaite, Texas. After the sale of the corn by that company it purchased corn to fill the order for delivery to it at Texarkana, Texas, and it did this to get the benefit of the low intrastate rate fixed by the Texas Railroad Commission from Texarkana to Goldthwaite. The company from which the Hardin Company bought had the corn shipped from Hudson, South Dakota, to Texarkana, Texas, with the privilege to stop the corn at Kansas City for inspection and transfer, and its agent at Texarkana there received the corn and acted as the agent of the Hardin

Company in having the corn reshipped to Goldthwaite over the Texas Pacific Railway and the Gulf, Colorado & Santa Fe Railway, the companies operating which were parties to a through tariff from Kansas City to Goldthwaite. This court upon writ of error affirmed a judgment of the State court imposing upon the Gulf, Colorado & Santa Fe Railway Company a penalty for collecting as its part of what it claimed to be the through rate more than the local rate from Texarkana to Goldthwaite fixed by the Texas Railroad Commission.

There was no suggestion there that the regulation of the intrastate rate by the State of Texas was a regulation of interstate commerce, because the carrier was compelled by reason of that regulation either to lower its interstate rate or to permit that part of its interstate shipment within the State of Texas to become a local shipment, and subject to local regulations.

Changes in interstate rates made from business policy to meet changed business conditions brought about by a State regulation of intrastate rates can not be said to result directly from such State regulation.

In Missouri Pac. R'y Co. v. Kansas, 216 U. S. 262, this court held that an order of the Kansas Railroad Commission requiring passenger train service between the terminus of a branch line within the State and its point of intersection with the State line did not directly burden interstate commerce. The court, by the present Chief Justice, said:

> "It is said that as the State line may be but a mere corn field, and great expense must result to

the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the State line, but 20 miles beyond, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions it is insisted that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the State of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the preformance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

While the carrier was compelled to either stop its interstate train at the State border or incur great expense in constructing terminal facilities there, yet the election to stop the interstate train was held to be voluntary.

It has repeatedly been held by this court that a State statute requiring an interstate carrier to assign colored intrastate passengers to coaches other than those provided for white passengers is not a regulation of interstate commerce.

Louisville, etc., R. Co. v. Mississippi, 133 U. S. 587.

Plessy v. Ferguson, 163 U. S. 537.

Chesapeake & Ohio R'y Co. v. Kentucky, 179 U. S. 388.

By upholding the right of the State to require carriers to separate colored intrastate passengers from white intrastate passengers, and at the same time denying to the State the right to separate colored interstate passengers from white interstate passengers the court recognizes the right of carriers to refuse to apply to interstate passengers State regulations as to intrastate passengers, even though discrimination may result, but as a matter of business policy the carrier finds it desirable to apply to interstate passengers the rule which the State imposes upon him as to intrastate passengers, and this the court has held he has the right to do.

Chiles v. Chesapeake & Ohio R'y Co., 218 U. S. 71.

But the fact that the practical result of the State regulation applying by its terms only to intrastate passengers is to bring interstate passengers under the same rule has never been thought by the court to be sufficient to invalidate such State regulations for the reason that there is no legal compulsion upon the carrier to extend the State regulation to interstate passengers.

It has been held by this court many times, and in cases upon which the railroad company here relies, that State regulations do not violate the commerce clause unless by their "necessary operation" they affect interstate commerce, and it can not be said that changes in interstate rates voluntarily made by a carrier as a matter of business policy to meet changes in intrastate rates forced upon him by the State are a part of the "necessary operation" of the State regulation. Besides, the fact that the

necessity for the changes may result from the fact that the carrier's interstate rates have been too high furnishes another reason why those changes can not be said to be a part of the "necessary operation" of the State regulation.

In Ames v. Union Pac. R'y Co., 64 Fed. 165, the judgment, in which was affirmed by this court in Smyth v. Ames, 169 U. S., Mr. Justice Brewer said:

> "Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute; but surely there is no legal compulsion. The statute of the State does not work a change in interstate rates, any more than the Act of Congress prescribing interstate rates would legally work a change in local rates. Railroads can not plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State."

In the Minnesota Rate Case (Shepard v. Northern Pac. R'y Co., 184 Fed. 765), decided by Circuit Judge Sanborn of the Eighth Circuit since this case was decided below, Judge Sanborn reached the conclusion that the reductions of intrastate rates involved in that case were so general and sweeping as to substantially burden and directly regulate interstate commerce, and he sought to avoid the effect of the language we have just quoted from the opinion of Mr. Justice Brewer in Ames v. Union Pac. R'y Co., by saying that the question was one of fact and

that no such condemnatory facts were presented to Mr. Justice Brewer in that case as were presented in the case then before the court, and that it was perhaps not too much to say "that no case has been found in the books in which any such proof of the unavoidable effect of general reductions of intrastate rates to substantially burden and directly regulate interstate commerce has ever been presented."

If the "unavoidable effect" of general reductions of intrastate rates is to directly regulate interstate commerce, surely the validity of such reductions can not depend upon the proof made in the particular case of such "unavoidable effect," as that is something of which the court must take judicial notice.

Judge Sanborn makes the extent to which the State regulation burdens interstate commerce the test of its validity, admitting that while a State regulation of a few rates or of the rates upon a single commodity may be valid such a regulation of a larger number of rates may be void merely because of the greater burden upon interstate commerce. It would follow from that reasoning that all the intrastate rates of a carrier might be changed by the State, one at a time, because the separate burden of each change upon interstate commerce would be slight, but that if all are changed at the same time it must be done by Congress because of the immediate and greater burden upon interstate commerce. The court failed to notice Smyth v. Ames, 169 U. S. 466, in which it was held that a statute fixing maximum rates for all the railroads of

the State of Nebraska as to all classes and commodities was within the power of the State. Nor did the court notice the case of Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, or the case of Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, in each of which the court assumed that the State had not trespassed upon the jurisdiction of Congress in making complete schedules of intrastate rates for interstate carriers.

If the test of validity of a State regulation of rates is the extent to which it affects interstate commerce, each interstate shipment is to be regarded as the whole of interstate commerce for the purpose of applying that test, interstate commerce being indivisible for that purpose, and therefore the number of shipments or the number of rates involved is immaterial.

If the jurisdiction of the State Commission depends upon the facts developed by the evidence as to the effect of its regulation upon interstate commerce, then that Commission is entitled to know what those facts are, and if the carrier does not bring to the attention of the Commission any facts tending to show that the regulation which the Commission is asked to make will affect interstate commerce it waives its right to object to the jurisdiction of that body to make the regulation. If the carrier may waive its objection to the jurisdiction of the Commission by failing to develop the facts in the courts there is no reason why it may not do so by failing to develop the facts before the Commission. But all this only serves to show that the question as to whether the State or Congress has jurisdiction to make

the regulation can not depend upon what the carrier may elect to prove as to the effect of the regulation, for if that be the test the jurisdiction may shift from the State to Congress or from Congress to the State at the carrier's will, the carrier alone having knowledge of the facts affecting the jurisdiction. The division of power between Congress and the States was not made for the benefit of the carriers as agencies of commerce but for the benefit of commerce itself, and therefore no rule ought to be adopted which would leave with the carriers the determination of the question as to whether the State or Congress shall have the power of regulation.

Whatever right interstate carriers have to be exempt from regulation by the State by virtue of the commerce clause of the Federal Constitution is derivative merely. It is not to be presumed that it is to the interest of the carriers to be regulated by Congress rather than by the States, for when Congress attempts to regulate them we find them contending that Congress is trespassing upon the jurisdiction of the States, and when one of the States attempts to regulate them we find them contending that the State is trespassing upon the jurisdiction of Congress. In theory, therefore, the struggle under the commerce clause is between Congress and the States, and not between the carriers and the States, nor between the carriers and Congress. At one time the carriers speak for the States and at another time they speak for Congress. Whenever the State is denied the power to make a rate regulation because it would affect interstate commerce it is not because the carrier has the

right to be exempt from that regulation, but because the power to make the regulation is in Congress. The power to regulate interstate commerce is given to Congress, it is true, in order that there may be uniformity of regulation of that part of commerce, but the power is primarily in the interest of the traveling and shipping public and not in the interest of the carriers. It follows, therefore, that whenever the State is stopped upon the ground that the commerce clause interposes a barrier to State regulation, Congress must have the power under the commerce clause to step in and make the regulation which the State is denied the power to make unless some fundamental right of the carrier be violated.

Rate regulation, in this respect, differs widely from the imposition of taxes, for of course Congress has not the power to impose taxes for State purposes, and if a tax imposed by the State upon interstate commerce is held invalid because in violation of the commerce clause, Congress can not intervene and impose the burden. But when a regulation is necessary for the protection of the people of a State either the State or Congress must have the power to make the regulation, and if Congress has not the power, the State must have the power as the State has all power for the protection of the public not given to Congress. It is manifest, therefore, that some things that are said in cases condemning State tax laws upon the ground that they burden interstate commerce may be misleading when applied to cases involving the validity of State regulations of

rates. The State, as we have seen, regulates rates in the exercise of its police power, which is broader than the taxing power. But even under the taxing power the State may indirectly burden interstate commerce by imposing taxes upon the instruments or vehicles of interstate commerce located in the State, and under the police power the State may *directly* regulate interstate commerce provided its regulations do not go beyond the necessities of the case, and do not conflict with any regulation made by Congress.

The power to regulate an intrastate rate is indivisible, and must rest wholly in Congress or wholly in the State. It can not be that the State may reduce the rate to a certain point and that the power to make a further reduction shall then be in Congress. Nor can it be that the power of the State to make the regulation depends upon whether or not the intrastate rate is a part of an interstate rate, for if that were true the carrier could at his will withdraw all intrastate rates from the control of the State. It also seems clear that the power of the State to regulate intrastate rates can not depend upon the number of rates to be regulated.

For the purpose of the argument that the State had no power to make the regulation complained of in this case it is fair to assume that the rates fixed by the Commission are reasonable, the only question being whether or not the mere fact that they burden interstate commerce (if that be a fact) shall relieve the carrier from the regulation, it being certain that Congress can not regulate intrastate rates, and that if the State can not require the

carrier to reduce these rates there is no power which can require the carrier to reduce them.

If the order of the Kentucky Railroad Commission fixing intrastate rates for the future is an unauthorized regulation of interstate commerce because it affects interstate commerce, then any action by the State of Kentucky through its courts which requires a reduction of existing intrastate rates is equally an unauthorized regulation of interstate commerce if such action affects interstate commerce. Therefore, under the doctrine for which the railroad company contends, if intrastate shippers should appeal to the Kentucky courts to grant them reparation under the common law rule prohibiting unreasonable rates, the courts and juries would have to inquire in each case just how far interstate commerce would be affected before they could know whether or not they would have power to grant relief.

In Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406, the court held that the common law is a rule of conduct proceeding from the supreme power of the State just as much as is a State statute, and that a State can no more regulate interstate commerce through the enforcement of common law rules than it can regulate interstate commerce through the enforcement of its statutes. If the validity of a rate order of the Commission under the statute depends upon the facts of the particular case as to the effect of the order upon interstate commerce the power of the State courts under the common law rule must depend upon the facts of the particular case as to the effect of the judgment

rendered, which is convincing that the validity of a rate order of the Commission can not depend upon the facts of the particular case as to the effect of the order upon interstate commerce.

If the power of the State to regulate intrastate rates depends upon the facts of the particular case as to the effect of the regulation upon interstate commerce, then as the power must be a continuing one the same regulation may be valid at one time and void at another as the effect upon interstate commerce changes. Whether the power of regulation is in the State or in Congress always depends upon the facts of the particular case as to the nature of the regulation, but never upon the facts of the particular case as to the effect of the regulation. In order that the effect upon interstate commerce of a State regulation may be such as to condemn that regulation that effect must be necessary or unavoidable, and an effect is not of that character if it depends upon conditions which are varying and uncertain, or which have been created by the carrier. Whether or not the State may directly burden interstate commerce in the exercise of its police power depends upon the necessities of the case, and the court may inquire into the facts of the particular case for the purpose of determining whether necessity for the regulation exists, provided the regulation directly burdens interstate commerce. If the burden results indirectly from the regulation of purely internal commerce no such inquiry arises as the State then has exclusive jurisdiction.

That it is necessary for the protection of shippers that the power to require intrastate rates to be reduced shall exist somewhere can not be doubted, and the question is whether the State or Congress shall have that power. It being clear that Congress has not the power, it follows that the State must have the power.

In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, the court, by Mr. Justice Peckham, referring to the power of Congress to regulate private contracts affecting interstate commerce, said (231):

> "If neither Congress nor the State Legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or national, which can legislate upon the subject or prohibit such contracts. This can not be the case."

Even under the test laid down by Judge Sanborn the regulation complained of in this case does not so substantially burden interstate commerce as to render it invalid, there being no general or sweeping reduction of intrastate rates.

In the Minnesota case rates on all classes and commodities were involved, and it appeared that much the greater part of the traffic of the carriers in Minnesota was interstate traffic, and that the lines of the carriers affected extended through several States in each of which the carriers had maintained the same basis of rates as to both interstate traffic and intrastate traffic, the traffic conditions in each of those States being the same. In the case at bar, however, the single railroad company in-

volved operates no line beyond the border of the State at the points from which the rates apply except that at Covington the carrier's line does extend to Cincinnati on the north bank of the Ohio River, and it does not appear that the interstate business moving through the points from which the rates apply to the several points to which the rates are fixed exceeds the intrastate business from the points through which the interstate business moves, the allegation being that the interstate business is at least one-half the whole. Besides, grain being the principal article affected even Judge Sanborn would recognize as controlling the cases of Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, and Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579, in which the rates involved applied only to coal.

Thus far we have assumed that the statute itself is not a regulation of interstate commerce, but it seems clear that if the order of the Commission is an unauthorized regulation of interstate commerce merely because it affects interstate commerce the statute itself is void for the same reason. It is quite clear that the statute restricts the Commission to the regulation of intrastate rates, and it is equally clear that the rate order complained of is within the power granted to the Commission. Therefore, if the order is void because it is a regulation of interstate commerce, the statute itself must be void because it authorizes such an order. The validity of the statute is determined not by what the Commission has done, but by what it is authorized to do. While the Commission is not authorized to make schedules of rates

it is empowered to change rates upon specific complaints until all intrastate rates have been changed, and the court judicially knows that when that has been done the relation previously existing between interstate rates and intrastate rates will be completely changed. Therefore, if the State has no power to make any regulation that will disturb that relation it follows that the statute itself is void. And if the statute is void because it burdens interstate commerce it is impossible to frame a statute that would be valid, and all State regulation is at an end, notwithstanding the long line of cases recognizing the exclusive power of the State to regulate intrastate rates. The conclusion of the lower court that neither the McChord Act nor the rate order complained of is a regulation of interstate commerce is supported not only by the decisions we have cited, and by many other decisions of this court, but by many decisions of the circuit courts, and by a long line of reports of the Interstate Commerce Commission.

Perkins v. Northern Pac. R'y Co., 155 Fed. 445.
St. Louis, etc., R. Co. v. Hadly, 168 Fed. 317.
Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957.
Arkansas Rate Cases, 187 Fed. 290.
In the matter of Freight Rates between Memphis and Arkansas Points, 11 I. C. C. R. 180.
Hastings Matting Co. v. Chicago, etc., R'y Co., 11 I. C. C. R. 675.
Saunders & Co. v. Southern Express Co., 18 I. C. C. R. 415.

V.

Complainant Has an Adequate Remedy at Law.

As the bill attacks the statute and the order of the Commission upon the ground that the statute is void upon its face and that the order of the Commission was made upon evidence which bore no "proper relation" to the question investigated, and is a regulation of interstate commerce, the remedy at law is adequate, and therefore, a court of equity has no jurisdiction. As to whether or not the statute is void upon its face can be quite as easily determined in a court of law as in a court of equity, and also the question whether or not the order of the Commission is a regulation of interstate commerce, and whether or not the evidence heard by the Commission had any bearing upon the question investigated, if that be a proper matter for inquiry.

The reasoning of the court in *Ex parte* Young, 209 U. S. 123, in answer to the argument that a court of equity had no jurisdiction because there was an adequate remedy at law seems conclusive that plaintiff under the Kentucky statutes and decisions has an adequate remedy at law. Certainly the plaintiff by violating the law would not take the risk of penalties which might overwhelm him for the reason that all violations of the order of the Commission prior to the first conviction constitute but a single offense, and the maximum penalty is a fine of $1,000.00. In the Young case, after saying that it would be a wonder if a single agent could be found to violate

the law even once in view of the risk of imprisonment for five years, the court said:

> "If, however, one should be found, and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. * * * Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid."

Again the court said:

> "To await proceedings against the company in a State court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest State court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid."

There is no allegation in the bill that the rates complained of are confiscatory, but merely that they are arbitrary, unjust and unreasonable, which is a conclusion of law, and is not equivalent to an allegation that the rates are so low as not to yield the plaintiff a fair return upon its investment. The only inquiry in such a case which no other court than a court of equity can properly make is whether or not the rates are confiscatory, and the bill does not ask the court to make that

inquiry. Whether or not either the statute or the order of the Commission is void upon any other ground can be as easily determined in a court of law as in a court of equity.

The general rule is that the Federal courts will not enjoin criminal prosecutions in the State courts (Fitts v. McGhee, 172 U. S. 516; *Ex parte* Young, 209 U. S. 123), and while the court held in McChord v. Louisville & Nashville R. Co., 183 U. S. 483, that the Railroad Commission might be enjoined from recommending indictments, yet where the members of the Commission deny, as they do in this case, any intention or threats to recommend indictments, and it is manifest that only one indictment would lie for all violations of the Commission's order prior to the first conviction, there seems to be no ground for an interlocutory injunction. If a criminal prosecution should be instituted upon the recommendation of the Commission there is no reason whatever why the question as to whether or not the statute or the order of the Commission is void upon its face should not be determined in such a prosecution.

VI.

No Right to Injunction as to Order Awarding Reparation.

That part of the bill which relates to the reparation order is clearly bad. The two orders are entirely separate and distinct. The act of the Commission in fixing rates for the future was a legislative act, while the act of the

Commission in awarding reparation for the past was an administrative act. The award was made under Section 829 of Kentucky Statutes, and can be enforced only by a proceeding in court. There is no room whatever for the contention that the proceeding for reparation was under the McChord Act. If the Commission was not authorized by Section 821 or Section 829 of Kentucky Statutes to award reparation it was not authorized to do so at all, and so the question is one of statutory construction. There is no suggestion in the bill that Section 829 of Kentucky Statutes violates the Federal Constitution, but it is argued that the statute is unconstitutional because the carrier is allowed to introduce no evidence in the courts other than that presented to the Commission. But as the carrier is given full opportunity to present all his evidence to the Commission it is difficult to understand how he is denied any constitutional right by not being permitted to present additional evidence to the court. It would be quite as reasonable to say that a party who has been given an opportunity to introduce all his evidence before an examiner or commissioner is deprived of his property without due process of law because he is denied the right to present additional evidence to the court. But the bill itself as to the order of reparation presents no Federal question, and, therefore, is multifarious.

1 Foster's Federal Practice, Sec. 74, p. 388.
Keasby & Mattison Co. v. Philip Carey Mfg. Co., 113 Fed. 432.

Even if the bill is not multifarious, the order refusing an injunction restraining the enforcement of the reparation order must be affirmed because that order is entirely separate and distinct from the legislative or rate order of the Commission, and as to it the bill presents no Federal question, and also because the Commission had power by virtue of Sections 816, 821 and 829 of Kentucky Statutes to make the award. It was held by the Court of Appeals of Kentucky in Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, that Section 816 is still in force to the extent that it gives a civil remedy, and was held by this court in McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, that Section 829 is still in force.

It certainly can not be that the carrier may charge any rate it pleases, however excessive, and leave the shipper wholly without any remedy except to prevent the carrier from charging the excessive rate after the Commission has found it to be excessive. If that be the law the Commission may delay the determination of the complaint indefinitely and thus deprive the shipper of all remedy for the period between the filing of the complaint and its determination, for if the McChord Act is the measure of the power of the Commission, the power to make an award for the period elapsing between the filing of the complaint and its determination no more exists than the power to grant reparation for the time prior to the filing of the complaint. As held by the court in the McChord case, the purpose of the McChord Act was to enlarge the rights of shippers and the powers of the Commission and not to restrict them. At common

law a shipper had the right to recover of the carrier the excess collected over a reasonable rate, and surely no common law right was taken away by the statute. If such a right still exists there is no reason to suppose that the Legislature intended to repeal the remedy given by Section 829 of Kentucky Statutes for the recovery of the excess. Even if Section 829 had been repealed, the Commission would have had power under Section 821 to make and enforce an award for the excess. But whether so or not, the question is one which has no bearing on the validity of the McChord Act or on the validity of the order of the Commission fixing a rate for the future, and is, therefore, exclusively for the State courts. All other reasons aside, the fact that the persons in whose favor reparation was granted are not before the court, furnishes a sufficient reason, as held by the lower court, for not enjoining the enforcement of the order of reparation.

VII.

Right to Injunction Must Be Free From Doubt.

That an injunction ought not to be granted by a Federal court to restrain the enforcement of rates fixed by or under a State statute, unless the right thereto is reasonably free from doubt is well settled.

In *Ex parte* Young, 209 U. S. 123, the court said:

> "Finally, it is objected that the necessary result of upholding this suit in the circuit court will be to

draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by State officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts."

Again in Willcox v. Consolidated Gas Co., 212 U. S. 19, the court said:

"Upon a careful consideration of the case before us we are of opinion that the complainant has filed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the State of New York are in fact confiscatory."

We ask that the judgment appealed from be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~416~~. 23

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - Appellant,

versus

ADAM T. SILER, LAURENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, - - - - - - - - - Appellees.

REPLY BRIEF FOR APPELLANT.

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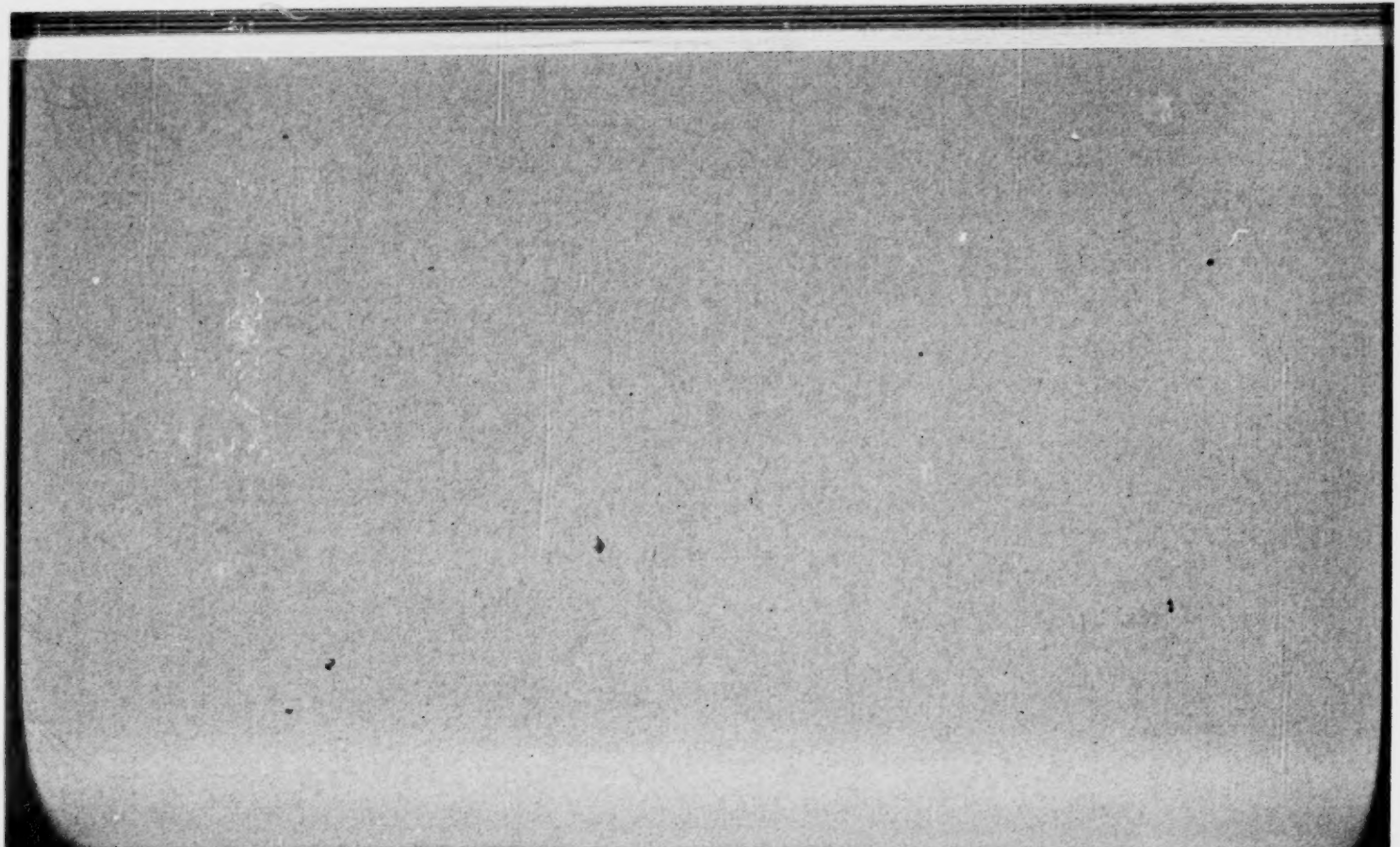

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 507.

Louisville & Nashville Railroad Company - Appellant,

versus

Adam T. Siler, Laurence B. Finn and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, - Appellees.

REPLY BRIEF FOR APPELLANT.

I.

THE ORDER OF THE RAILROAD COMMISSION OF KENTUCKY WOULD, IF ENFORCED, DIRECTLY AND NECESSARILY AMOUNT TO AND OPERATE AS AN INTERFERENCE WITH AND A REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID ON THAT ACCOUNT.

A.

Appellees' Counsel Misapprehend the Facts Upon Which This Proposition is Maintained.

The *facts* upon which appellant has maintained the proposition that the rate order of August 10, 1910, of the

Railroad Commission of Kentucky would, if enforced, directly and necessarily amount to and operate as an interference with and a regulation of interstate commerce, and is, on that account, unconstitutional and void, are stated concisely on pages 149 and 150 of our original brief, and are set forth in detail on pages 150 to 168, inclusive, of that brief. Reference to those pages of our brief will show that appellees either inadequately understand or entirely misapprehend the facts upon which this contention is based.

For example, appellant does not contend, as is indicated by appellees on page 64 of their brief, that the order of the Commission is a regulation of interstate commerce, for the mere reason that the rates to which it relates "enter into and form a part of certain interstate rates set forth in a tariff filed with the Interstate Commerce Commission." As is clearly stated on page 149 of our brief, and explained *in extenso* on pages 150 to 153, inclusive, the order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate revenues and traffic, regardless of the filing of any specific tariff with the Interstate Commerce Commission; and the results arising from the filing of such tariff with the Interstate Commerce Commission are merely incidental, and not by any means the prime cause of the effect complained of. The allegations set forth on pages 150 to 153 of our brief in support of the first statement of fact—that the order of the State Railroad Commission would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate

revenues and traffic—and the pleadings cited on pages 165 to 168, inclusive, of our brief in support of the third statement of fact—that the order of the State Railroad Commission, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities and commerce of the State of Kentucky and against citizens, localities and the commerce of other States—are a complete refutation of the statement made on page 64 of appellees' brief, that there is nothing in the bill to show that a reduction of the intrastate rates will necessitate a reduction of interstate rates. It is clear, likewise, from what appellees have to say on page 65 of their brief, that they do not fully appreciate the unjust discrimination which would necessarily arise if the order of the State Railroad Commission were put into effect. For example, appellees mention only that discrimination which would arise from making different rates from the north bank and from the south bank of the river. They ignore completely the discrimination which would arise from the application of different rates on interstate traffic and intrastate traffic for the same service from the same points, and the discrimination which would arise from the enforced violation of the long and short haul clause of the fourth section of the Act to Regulate Commerce, and the violation of similar provisions of the statutes of the State of Kentucky. We submit that the facts as to unjust discrimination set forth in the second and third statements of fact, on pages 149 and 150 of our brief, are fully established by the uncontradicted allegations of the verified pleadings of appellant, and by supporting affidavits, as set forth in detail

Railroad Commission of Kentucky would, if enforced, directly and necessarily amount to and operate as an interference with and a regulation of interstate commerce, and is, on that account, unconstitutional and void, are stated concisely on pages 149 and 150 of our original brief, and are set forth in detail on pages 150 to 168, inclusive, of that brief. Reference to those pages of our brief will show that appellees either inadequately understand or entirely misapprehend the facts upon which this contention is based.

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on pages 153 to 168, inclusive, of our brief, with reference to those facts.

B.

In addition to the Facts Heretofore Set Forth in Support of this Proposition, there is to be Considered the Fact, of Which the Court Will Take Judicial Notice, that the Elements of Intrastate Traffic Handled on Interstate Railroads and the Elements of Interstate Traffic Handled on Such Railroads are so Intermixed, Interdependent, Indivisible, and Inseparable, that it is Impossible, in Connection with Such Railroads, to Regulate or Adjust the One Kind of Traffic Without Regulating, Adjusting and Interfering with the Other Kind of Traffic.

That the elements of intrastate traffic handled on interstate railroads and the elements of interstate traffic handled on such railroads are so interwoven, interdependent, indivisible, and inseparable, that it is impossible, in connection with such railroads, to regulate or adjust the one kind of traffic without regulating, adjusting and interfering with the other kind of traffic, is a fact which, in the light of human experience, is incapable of dispute, and which does not require proof.

As was said by Judge Amidon, in the case of *Northern Pacific R'y Co.* v. *Keyes*, 91 Fed. 47, 52:

> The fundamental question in all cases like these is, will the rate prescribed by the State pay the expense of doing the local business and leave to the carrier a reasonable compensation upon the fair value of the property which it employs in performing the service? Certain of the factors necessary to a

determination of this question are capable of definite knowledge; others must forever rest largely upon opinions. The income derived by the carrier from the business which it conducts within the State can be ascertained accurately from the records of the company, but the expense of doing that business is not susceptible of mathematical ascertainment. Many of its items apply equally to local and interstate business; the different kinds of traffic are often carried in the same train and not infrequently in the same car; it is absolutely impossible to divide the cost of traffic thus moved, and say that this amount should be attributed to local business and that amount to interstate.

Prof. Logan G. McPherson, Lecturer on Transportation at Johns Hopkins University, in his book, "The Workings of the Railroads," says, at page 91:

The expenditures of a railroad must be regarded as a whole. This total expenditure can not be allocated among particular trains or particular cars, and therefore it can not be determined just what it costs to haul any particular commodity any particular distance. This fundamental concept, which no student of railway economics refutes, was announced by Judge Cooley, its first chairman, in one of the early reports of the Interstate Commerce Commission.

Mr. Emory R. Johnson, Assistant Professor of Transportation and Commerce in the University of Pennsylvania, member of the Isthmian Canal Commission from 1889 to 1903, says in his work on "American Railway Transportation," pages 272 to 274:

In whichever sense the term 'cost' is used it is practically impossible for the railroad official to as-

certain what are the costs of a particular transportation service. Every railroad engaged in general traffic carries thousands of different commodities; the cargo of a freight train is usually made up of a large variety of articles and frequently several kinds of goods are sent in the same car; to enable the company to run a train or haul a car the roadway, depots, yards, and all the different parts of the service have to be provided; out of the gross receipts obtained from the shippers and passengers the various expenses of the company are met, but no company is able to determine just what part of the expense incurred by the several branches of this service should be charged against the man who has sent a ton or a carload of goods a certain distance over the company's road, or against the man who has traveled a given number of miles on the line. Most of the expenditures of a railroad company are joint costs, *i. e.*, they are paid out for the maintenance of the service as a whole and have little direct connection with any particular act of transportation; the tracks, station yards, offices and administrative departments all assist in performing every one of the activities of the company. The revenues obtained from each freight and passenger service performed should, if possible, be made to contribute something, but no one can say just how much, toward the joint or aggregate costs of maintaining and operating the transportation organization. About as far as the traffic official can go in measuring costs is to calculate the expenses of running a train. The outlay for wages of train crew, for fuel, oil, repairs and maintenance of cars and locomotives can be calculated rather closely, and thus the expense of moving a particular train a mile, the train mile cost, can be got at with some degree of certainty, but unless the train is loaded with only one commodity this does not enable the statistician to calculate what movement expenses

> are incurred in connection with each or any of the articles of freight of which the train's cargo is composed. Besides meeting the expenses due to moving the train, the receipts from the traffic carried by the train should contribute a greater or less amount toward defraying the company's joint cost, but how much of the joint expenses to charge against any particular train no one can determine, much less can one decide how much of the joint costs are incurred by each commodity in the cargo.

And the same opinion as to the impossibility of dividing the costs or elements of interstate traffic from the costs or elements of intrastate traffic is held by substantially all accountants and economists by whom the subject has been considered.

As was said long ago by Stone, J., in *South & North Alabama Railroad Co.* v. *Pilgreen*, 62 Ala. 307, railroads "are of too general use for the courts not to know generally their *modus operandi*." And this court has said (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 37) that it

> can not fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the

States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

The Act to Regulate Commerce, in terms, gives to the Interstate Commerce Commission authority over interstate commerce only, and yet all classifications of the accounts of interstate railroads prescribed by the Interstate Commerce Commission, in accordance with the Twentieth Section of the Act to Regulate Commerce, necessarily embrace all of the business of those railroads, interstate and intrastate combined. For example, the Form of General Balance Sheet Statement prescribed by the Interstate Commerce Commission for Steam Roads, in accordance with that Section, provides for showing as assets *all* property owned as investment, including physical property owned, securities owned, and investments, both on account of interstate traffic and on account of intrastate traffic, and *all* working assets, whether such assets are required for the conduct of the interstate or the intrastate traffic; and as liabilities there must be shown *all* stock, *all* mortgaged, bonded, and secured debt, and *all* working liabilities, relating both to interstate and to intrastate business. In the Classification of Expenditures for Road and Equipment as prescribed by the Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, carriers subject to the Act are required to classify *all* items of Road, such as right-of-way and station grounds, grading, tun-

nels, bridges, trestles and culverts, ties, rails, ballast, station buildings and fixtures, water stations, fuel stations, grain elevators, etc., *all* items of Equipment, such as steam locomotives, passenger train cars, freight train cars, work equipment, etc., and *all* General Expenditures, such as law expenses, stationery and printing, insurance, taxes, etc., regardless of the question as to whether the expenditures were required for the purpose of the interstate traffic or for the purpose of the intrastate traffic. Manifestly, many of these items of property, such as right-of-way, ties, ballast, and station buildings, would be required if only an interstate traffic were conducted, or if only an intrastate traffic were conducted, and it is impossible for any one to say, except in accordance with some arbitrary rule, how much of this property shall be apportioned to the one account, interstate, or to the other account, intrastate. The Classification of Operating Revenues as prescribed by the Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, requires classification of *all* Freight Revenue, *all* Passenger Revenue, *all* Excess Baggage Revenue, etc., although, with particular reference to the revenues, it is, as a general rule, possible to make a distribution between interstate traffic and intrastate traffic. The Classification of Operating Expenses as prescribed by the Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, requires the distribution of *all* expenses for Maintenance of Way and Structures, *all* expenses for Maintenance of Equipment, *all* Traffic Expenses, *all* Transportation Expenses, and *all* General Expenses. It is manifestly impossible to say, except in accordance with some arbitrary rule, what part of

Maintenance of Way and Structures Expenses (such as ballast, ties, rails, other track material), what part of Maintenance of Equipment Expenses (such as repairs, renewals and depreciation of steam locomotives, passenger train cars and freight train cars), what part of Traffic Expenses (such as advertising, stationery and printing, and outside agencies), what part of Transportation Expenses (such as yardmasters and their clerks, yard conductors and brakemen, road enginemen, fuel for road locomotives, train supplies and expenses), or what part of General Expenses (such as salaries and expenses of general officers, law expenses, etc.), shall be charged to intrastate traffic, and what part shall be charged to interstate traffic. No one can say, for example, what part of the expenses resulting from the wearing and rotting of ties or the wearing and rusting of rails between Newport, Ky., and Bardstown, Ky., shall be charged against the interstate traffic moving between those points and what part shall be charged against the intrastate traffic moving between those points, and under investigation in this proceeding. No one can say, except as the result of an arbitrary rule, what part of the wages of enginemen and trainmen, or what part of other train expenses, shall be charged against interstate and intrastate traffic, respectively, when the two kinds of traffic are carried on the same train, and frequently in the same cars. The Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, not only prescribes the classification of Operating Expenses and the Property accounts, but prescribes what items shall be treated as Operating Expenses and what items shall be treated as Additions and Betterments, or Capital or Property accounts. And these

requirements of the Interstate Commerce Commission necessarily relate to the entire business of the carriers, interstate and intrastate combined. The lines of the Louisville & Nashville Railroad Company extend through many States; many of the expenses incurred by it in conducting its business (such as salaries and expenses of general officers) are incurred in common for the traffic of the several States through which it passes; and a large part of its property (such as general office building, and its rolling stock equipment which is continually passing from one State to another) is used in common for the business of the several States. The property and expenses incurred in conducting the business of one State are thus inseparably intermixed with the property and expenses incurred in conducting the business of other States, and no one can say, except in accordance with some arbitrary rule, how a distribution shall be made between the several States; and, even if a distribution between States can be effected, no one can say, except in accordance with an arbitrary rule, how the distribution of property and expenses attributable to any single State shall be effected as between interstate and intrastate traffic.

Although the present discussion is one of fact, it may be well at this point to anticipate a question of law, in order to show why the fact of intermixture and inseparability of the elements of interstate commerce and of intrastate commerce as conducted by interstate railroads is material to the contention of appellant that the order of August 10, 1910, of the Railroad Commission of Kentucky would, if enforced, directly and necessarily amount to and operate as an interference with and regulation of interstate commerce. Appellant, the Louisville

& Nashville Railroad Company, as is well known, and as is shown by the pleadings, is a carrier of both interstate commerce and intrastate commerce. The two kinds of commerce are carried on the same trains, frequently in the same cars, and use jointly the same rails, ties, and other facilities. It is impossible to divide the facilities so jointly used or to distribute the elements of the business between interstate traffic and intrastate traffic. It is contended by appellant that the usual methods of handling interstate traffic and intrastate traffic on interstate railroads, and the resulting intermixing, interdependence, and indivisibility of the two kinds of traffic as handled on such railroads, are so well known that a court will not require evidence thereof because it would not be good sense so to do; and that while a State may regulate its "strictly internal commerce" *it is impossible for a State to regulate the intrastate rates of interstate railroads without interfering with, burdening, and regulating interstate commerce.* The obstacle in the way of State regulation in such cases is not to be found in the denial of the abstract right of a State to affect, in the legitimate exercise of its reserved powers, commerce of a local nature which does not seem to require a uniform rule of regulation, but the objection is to be found in the practical fact that *where both interstate commerce and intrastate commerce are carried on by the same agencies there is no traffic of a local nature, no traffic which does not require a uniform rule of regulation; and all traffic carried on by interstate railroads is either, on the one hand, clearly interstate commerce, or, on the other hand, is intrastate commerce "among" the States, which is national in its character and demands uniformity of*

regulation, and with respect to which Congress alone can legislate.

It is evident that that part of commerce "among" the States, both interstate and intrastate, which is carried on by interstate railroads is national in its character and demands uniformity of regulation, and that, therefore, Congress alone can legislate with respect to such traffic, and when Congress has not legislated it necessarily follows that such traffic is to be free from all legislation whatever.

Having thus amplified the facts upon which we base our proposition, we re-state them as follows:

1. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate revenues and traffic.

2. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, destroy commercial relationships for many years existing between points in the State of Kentucky and points outside of the State, and would create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

3. The order of the State Railroad Commission reducing appellant's intrastate rates, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

4. The elements of intrastate traffic handled on interstate railroads and the elements of interstate traffic handled on such railroads are so intermixed, interdependent, indivisible, and inseparable that it is impossible, in connection with such railroads, to regulate or adjust the one kind of traffic without regulating, adjusting and interfering with the other kind of traffic.

C.

The Authorities Cited by Appellees Are Not in Conflict With Appellant's Proposition; and Where Appellees' Conclusions of Law in this Respect Are Opposed to the Proposition, Such Conclusions of Law Are Not Supported by the Authorities Cited.

As was pointed out by us on page 189 of our original brief, with reference to the opinion of Judge Sanborn in the case of *Shepard* v. *Northern Pacific R'y Co.*, 184 Fed. 765, the principles and rules of law by which these orders and acts must be tried have been conclusively established by the decisions of the Supreme Court, and it would seem that the question of interference with interstate commerce is to be determined by ascertaining whether or not the facts established show an interference with, and a burden upon, and a regulation of, interstate commerce, which is prohibited by the settled principles of law.

Appellees, however, at pages 64 to 115, inclusive, of their brief, cite numerous authorities, many of which appear to us irrelevant, some of which merely announce well established principles which are not at all in conflict with our contentions, and not any of which support a

single conclusion of law drawn by appellees against our proposition.

For example, on page 66 of their brief appellees cite the case of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, to show that for the purpose of Government regulation commerce is divided into three parts. This citation is not at all relevant to the proposition under discussion, as is afterward admitted by appellees in their discussion, on pages 70 and 71 of their brief, of the case of *County of Mobile* v. *Kimball*, 102 U. S. 691. And throughout the discussion of this proposition appellees repeatedly cite cases to show the power of a State to regulate an "auxiliary" of commerce, although they admit, on page 71, that in the case at bar we are dealing with a regulation of commerce strictly considered, and not with a regulation of a mere auxiliary of commerce. And, as also admitted by appellees (on page 71 of their brief), either the State or Congress has exclusive jurisdiction of commerce strictly considered.

We are in entire accord with the statement that either the State or Congress has exclusive jurisdiction of commerce strictly considered, and we contend that the commerce strictly considered which is carried on by interstate railroads is commerce which extends to and affects more States than one, and with respect to which a uniform rule of regulation is required, and is, therefore, commerce over which exclusive jurisdiction rests with the Congress of the United States. Appellees say (pp. 66 and 67 of their brief):

> That each State has exclusive jurisdiction to regulate transportation of goods wholly within its borders has been so often decided by this court that it is no longer an open question.

To this statement we assent, but we do not agree to the unwarranted attempt of appellees to treat the traffic of a State "wholly within its borders" or "the strictly internal commerce" of a State as synonymous with the intrastate traffic of a State as usually understood. None of the cases cited by appellees supports in any way their attempt to show that all intrastate traffic of a State is within that State's exclusive jurisdiction.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, the first cited by appellees in this connection, the delimitation of the exclusive jurisdictions of the Nation and the State, respectively, is clearly set out. It is clear from the distribution of powers there announced by Chief Justice Marshall that the commerce reserved to the States is not *all* intrastate commerce, but is only that intrastate commerce which is completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. Accordingly, we agree with our opponents that either the State or Congress has exclusive jurisdiction of commerce strictly considered, such as that with which we are dealing in the case at bar. And we assert:

(a)—That the power of Congress over interstate commerce is exclusive.

(b)—That the power of Congress is exclusive over that part of intrastate traffic which extends to or affects other States, or with which it may be necessary to interfere for the purpose of executing some of the general powers of the Government. And—

(c)—That the power of the State is exclusive over that part of intrastate commerce only, which is

> completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.

In the citation from the case of *The Daniel Ball* v. *United States,* 10 Wall. 557 (on page 67 of their brief), appellees have omitted the word "and" between the word "State" and the word "does," in the next to the last line, thereby materially changing the sense of the citation. This court did not say, in the case of the *Daniel Ball,* that that commerce which is carried on entirely within the limits of the State does not extend to or affect other States, and is, therefore, excluded from Federal control, but what this court did say was just what we have stated above—that the commerce excluded from Federal control is that part of intrastate commerce which "does not extend to or affect other States."

Apart from the fact that the rule announced in *Western Union Telegraph Co.* v. *Texas,* 105 U. S. 460 (cited by appellees on pages 67 and 68 of their brief) relates merely to the "purely internal commerce of the State" which "does not affect other nations or states or Indian tribes," and is in entire consonance with the distribution of powers contended for by us, it is to be noted that the statement of the court with reference to the tax which might be laid by a State upon messages exclusively within its own jurisdiction is a mere dictum, and the judgment of the Supreme Court of Texas in that case was reversed and the cause remanded, with instructions to reverse the judgment of the district court and proceed thereafter as justice might require. It is further to be noted that in the later case of *Western Union Telegraph*

Co. v. *Kansas*, 216 U. S. 1, 27, this court held that a statute, under which a fee was demanded as a condition of the right of a telegraph company to do a local business in the State of Kansas, and which, in terms, applied to intrastate traffic only, but which, reasonably interpreted, either directly or by its necessary operation burdened interstate commerce, was unconstitutional.

The case of *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288 (cited by appellees on page 68 of their brief) is not controlling, for the reason that the question of interference with interstate commerce was not raised in that case. The case involved only the question of violation of the Fourteenth Amendment to the Constitution of the United States and the question of impairment of the obligation of a contract alleged to exist by reason of the ordinance of 1787 "for the government of the territory of the United States northwest of the river Ohio." But even if the case were controlling, the citation is not in point, for Mr. Justice Field merely said what we have stated above—that the jurisdiction of a State is exclusive with reference to its intrastate commerce "which is wholly confined within its limits." Obviously, this has no reference to that intrastate commerce which extends to or affects other States.

The case of *Missouri Pacific R'y Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (cited by appellees on pages 68 and 69 of their brief) is not in point, because, as was said by the court (p. 621), that case did not rest upon any distinction between interstate commerce and that wholly within the State. The law applied in that case was not established by State authority, but was merely adminis-

tered by a State court. The right of State courts to administer the common law as relating to interstate commerce is not in issue. And in that case the court distinguished the case of *McNeill v. Southern R'y Co.*, 202 U. S. 543, in which a rule of action established by a State Railroad Commission, which did affect interstate commerce, was held to be a regulation of such commerce, and, in consequence, repugnant to the commerce clause of the Constitution.

The case of *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171 (cited by appellees on page 69 of their brief), is not applicable. That case covered merely the right of a State to tax a company for the privilege of doing a local business which it was free to renounce, and which it could renounce or retain without effect upon its interstate traffic. Appellant, in the case at bar, is not free to renounce its intrastate traffic in Kentucky; and, as was held by this court in the case of *Western Union Telegraph Co. v. Kansas, supra*, and in the case of *Pullman Co. v. Kansas*, in the same report, if a statute relating in terms only to intrastate traffic, nevertheless, as reasonably interpreted, either directly or by its necessary operation burdens interstate commerce, such a statute is void.

The *Employers' Liability Cases*, 207 U. S. 463 (cited by appellees on pages 69 and 70 of their brief) are not in point, because there is no doubt that in cases where interstate traffic is affected (as where both interstate traffic and intrastate traffic are carried on the same train) the authority of Congress would apply. It was only because the act, in terms, covered intrastate traffic which

did not extend to or affect other States, and with which it was not necessary to interfere in order to exercise any of the general powers of Government, that it was declared unconstitutional. The necessity for a uniform rule of regulation in cases where both interstate traffic and intrastate traffic are concerned, and the consequent exclusiveness of the jurisdiction of Congress, is announced in the recent opinion of this court in the case of *Southern R'y Co.* v. *United States*, 222 U. S. 20, with reference to the application of the Federal Safety Appliance Acts. As was indicated in our original brief (p. 186), the opinion in the *Employers' Liability Cases* reiterates the principles announced in *Gibbons v. Ogden*, upon which principles our proposition is firmly established. In the *Employers' Liability Cases* this court said (p. 493), with reference to the opinion of Mr. Chief Justice Marshall in *Gibbons v. Ogden:*

> Accepting, as we do now, and as has always been done, this comprehensive statement of the power of Congress, we adopt and reiterate the perspicuous statement made in the same case (p. 194), of those matters of State control which are not embraced in the grant of authority to Congress to regulate commerce.

The case of *New York, ex rel. Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21 (cited by appellees on page 70 of their brief), is not in point, because in that case there existed a separation between the transportation service wholly within the State and that between the States, and the intrastate traffic under consideration did not extend to or affect other States. In this case a separation of the interstate traffic and intrastate traffic is impossible, and

the attempted regulation of intrastate rates necessarily extends to and affects other States.

The case of *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17 (cited by appellees on page 71 of their brief) was decided by a bare majority of this court, and, upon the principles as decided, is not applicable in this case. That case turned upon a regulation of commerce effected by Congress in the Wilson Act. And in that case the court quoted with approval (p. 24) the statement *In Re Rahrer* 140 U. S. 545, 562:

> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

In short, the decision was clearly pitched upon the point that the Wilson Act effected a divestment or separation of interstate commerce, and the Malt Liquor Inspection Law of Missouri was held to be constitutional, therefore, merely because it was held not to extend to or affect the commerce of other States.

The argument which appellees make as to direct and indirect burdens merely amounts to saying that a State may do that indirectly which it is prohibited by the Constitution of the United States from doing directly. The mere statement of this absurdity refutes it. It is clear that where this court has referred to direct and indirect effects of State action in its decisions the word "indirectly" has been used in the sense of "incidentally," or "immaterially." This court has directly said (216 U. S. 1, 27) that if a State statute, reasonably interpreted,

either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted.

In view of the repeated declarations of this court that the genius and character of the Federal power over commerce require that its action be applied, not only to the external concerns of the Nation, but also to those internal concerns which *affect* the States generally; and that the power of the States is limited to that commerce which is completely within a particular State and which does not *affect* other States; and that the test of the validity of State statutes which attempt to regulate the rates of intrastate traffic is to be found in their *effect* upon commerce among the States; and that the Legislatures, neither by giving their enactments a particular name nor by the use of some form of words, can take away the duty of courts to consider the nature and *effect* of a State statute; and that in determining whether a statute does or does not burden interstate commerce the court will look beyond mere form and consider the *substance* of things; and that in whatever language a statute may be framed its purpose may be determined by its natural and reasonable *effect.* The contention raised by appellees on page 73 of their brief, that a State has power to regulate intrastate rates without regard to the *effect* of such regulation upon interstate commerce, is manifestly untenable.

Gibbons v. *Ogden,* 9 Wheat. 1, 195.
Southern R'y v. *King,* 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. *Texas,* 210 U. S. 217, 227.
Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1, 27.

Henderson v. *Mayor of New York*, 92 U. S. 259, 268.

It is not clear why appellees have cited, on page 74 of their brief, the case of *Houston & Texas Central Railroad Co.* v. *Mayes*, 201 U. S. 321. This case is simply one of many in which this court has held that attempted legislation by a State in the exercise of its alleged police power is void when its *effect* is substantially to burden interstate commerce. In this case, the court said (p. 331):

> Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature.

And just prior to the quotation made by appellees the court said, with reference to rules established by the States in the exercise of their police power (p. 328):

> Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, *and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce.* (Italics are ours.)

Appellees say (on page 74 of their brief) that this court has repeatedly held that the regulation of rates for transportation of goods wholly within a single State is a regulation of internal commerce, and that the fact that such regulation by the State affects interstate commerce

does not render it invalid. This statement, so far as it asserts that the regulation of traffic wholly within a single State which does not extend to or affect other States is a regulation of internal commerce, is true, but we emphatically deny that this court has ever held that the fact that such regulation by the State affects interstate commerce does not render it invalid. None of the citations made by appellees in support of the assertion here made by them establishes anything more than the right of a State to regulate its intrastate traffic which does not extend to or affect other States. Wherever the regulation has affected other States, the act of the State has been pronounced unconstitutional and void. Following the citation from the Farmers Loan & Trust Co. case (116 U. S. 307) made by appellees on page 75 of their brief, this court said in that case (pp. 334-335):

> While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress, that is to say, using the language of this court in Cardwell v. Bridge Co., 113 U. S. 205, 210, 'when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States.' *Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic.* It is not enough to prevent the State from acting that the road in Mississippi is used in aid of interstate commerce. *Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.* (Italics are ours.)

In the case of *Louisville & Nashville Railroad Co.* v. *Kentucky*, 183 U. S. 503, cited by appellees on pages 75 and 76 of their brief, there was simply no interference shown by the Kentucky long and short haul regulation with the traffic of other States. However, under the interpretation of the same regulation which was contended for by the State, in the case of *Louisville & Nashville Railroad Co.* v. *Eubank*, 184 U. S. 27, there was shown an interference with interstate commerce, and the regulation was declared unconstitutional insofar as it extended to or affected the traffic of other States.

In *Northern Pacific Railway Co.* v. *North Dakota*, 216 U. S. 579 (cited by appellees on page 76 of their brief), the question of interference with interstate commerce was not considered by this court. This court did refer to this point as one of the grounds of decision in the Supreme Court of the State, but, as shown in the opinion of Mr. Justice Holmes (p. 580), the State court intimated its opinion that if the railroad was able to make a fair profit upon its whole business within the State it might be required to carry a particular commodity at cost, or possibly below, and it expressed its opinion so strongly that the counsel for the plaintiff in error treated that doctrine as the sole ground of decision. The question of interference with interstate commerce was, therefore, clearly not raised before this court.

The only inference to be drawn from appellees' citation of sundry other cases in which this question was not "suggested" is that as the point was not raised, the cases are not applicable and should not have been cited by appellees in their brief.

In the case of *Missouri, Kansas & Texas R'y* v. *Haber*, 169 U. S. 613, cited by appellees on page 79 of their

brief, no principle of law was established which relates to the case at bar. The court simply held in that case that the statute complained of did not in fact operate as a burden upon interstate commerce, and Mr. Justice Harlan said (p. 635):

> It is suggested that the statute is so drawn that the railway company would be liable even if it acted in good faith and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statute were thus interpreted, it might be—though upon that point we express no opinion—that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in Railroad Co. v. Husen. But we do not so construe the statute.

The citation of the case of *Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 173 U. S. 285 (made by appellees on pages 79 and 80 of their brief), establishes nothing more than the right of a State to make police regulations where such regulations do not interfere with interstate commerce and do not extend to or affect other States. That a State may not make even such police regulations when they interfere with or burden interstate commerce, or extend to or affect the commerce of other States, has been so frequently decided by this court, and the principle is so well settled, that citation is unnecessary.

When appellees deny (p. 85 of their biref) that Con-

gress has the power to prohibit favors to intrastate shipments as against interstate shipments, they deny the authority which it was the very purpose of the commerce clause to confer, and they deny that principle which, more than any other cause, led to the adoption of the Constitution.

In our original brief (p. 179) we drew attention to the intolerable conditions which would exist if there were no authority to prevent unjust discriminations between interstate rates and intrastate rates as contended for by appellees on pages 87 and 88 of their brief, and we also there drew attention to the fallacy of measuring the power of the Nation by the Act to Regulate Commerce instead of by the Constitution of the United States. Appellees contend (p. 97 of their brief) that such injustices or inconveniences are merely the unavoidable effect of our dual form of government. The constitutional history of the United States shows that the avoidance of such inconvenience and injustice, and the purpose of committing such affairs to a single authority, was the chief reason leading to the adoption of the Constitution.

If, as contended by appellees (p. 100 of their brief), every regulation of intrastate rates must restrain the carrier to some extent in fixing interstate rates, then, indeed, it is true that there can be no regulation of intrastate rates by the State, and it is also, indeed, true that the regulation of intrastate rates on interstate railroads by a State is no longer feasible, and all rate regulation affecting interstate railroads must be national.

This does not mean that all local regulation of interstate carriers must cease. Wherever the subject, by reason of its local nature, does not seem to require a

uniform rule of regulation, or where it pertains solely to the internal commerce of a State and does not extend to or affect other States, the State may regulate; but when the laws of a State or the orders of its Commission relating to its intrastate commerce, by their necessary, or natural, or probable operation, have the effect substantially to burden interstate commerce, such laws or orders are beyond the powers of the State, are repugnant to the commerce clause of the Constitution, and are in conflict with the supreme law of the land.

The question is not, as indicated by appellees on pages 108 and 109 of their brief, one as between the interest of the traveling and shipping public on the one hand, and the interest of the carriers on the other, but is one of limitation of the powers of the States. The exclusive power given to Congress by the commerce clause is not a power exclusive of the interest of the traveling and shipping public, nor is it a power exclusive of the interest of the carriers. It is not a power limiting the *people* of the States; it is a power limiting the authority of the *States* themselves.

There is, in the determination of this question, no necessity for quibbling over the meaning of words or phrases used in separate decisions of this court. There is, in fact, no necessity for reference to any single decision. The matter must be determined upon principles and rules of law which have been conclusively established, and we submit that the four statements of fact which have been hereinabove set forth show the necessity for a uniform rule of regulation with respect to the RATES of interstate railroads, and our proposition is firmly established by the following broad principles and rules of law, which are beyond dispute:

D.

The Federal Power Over Commerce is Exclusive Whenever a Uniform Rule of Regulation is Required.

The power to regulate commerce *among* the States, not merely *between* the States, is granted by the Constitution to the Congress of the Nation. The power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

No State, either by virtue of its police power or under any other power, can constitutionally burden, restrict, or infringe upon this paramount power of Congress.

When the commerce sought to be affected is completely internal and does not extend to or affect other States, and when the subject from its local nature does not seem to require a uniform rule of regulation, the State may regulate; but where the subject is national in its character, and demands uniformity of regulation, Congress alone can legislate, and when Congress has not legislated it necessarily follows that the subject is to be free from all legislation whatever. The power delegated to Congress was the power to regulate commerce "*among the several States,*" *not among the people of the States.* The sole object of the adoption of this clause of the Constitution was to confer upon Congress the power to prevent such action *by the several States as might prefer their own commerce over that of other States.* To hold that the power over commerce which affects, directly or indirectly, more States than one is not exclusive of the power of the States, would be absolutely and totally contradictory and repugnant to the purpose of the grant.

When Congress has not legislated upon the subject, the courts will enforce the national power over commerce in accordance with that common law which obtains generally throughout the United States, and which operates upon all commercial transactions.

Gibbons v. *Ogden*, 9 Wheat. 1, 196, 224, 225, 231.
Cooley v. *Board*, 12 How. 299, 319.
State Freight Tax, 15 Wall. 232, 280.
Welton v. *Missouri*, 91 U. S. 275, 280-282.
Henderson v. *Mayor*, 92 U. S. 259, 272.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196, 203-204.
Northern Securities Co. v. *United States*, 193 U. S. 197, *Dissenting Opinion of White, J., the Chief Justice, Peckham and Holmes, JJ.*
The Federalist, No. 7.
The Federalist, No. 22.
Western Union Tel. Co. v. *Call Pub. Co.*, 181 U. S. 92, 100-101.
N. Y., N. H. & H. R. R. Co. v. *I. C. C.*, 200 U. S. 361, 391.
Passenger Cases, 7 How. 283, 399-400.

E.

The Federal Power Over Commerce is Exclusive Not Only With Respect to Interstate Traffic, But Also With Respect to Intrastate Traffic Which Extends to or Affects Other States.

The exclusive power of Congress over interstate commerce is generally admitted, but our opponents assume that while Congress has exclusive power over interstate commerce, the right to regulate intrastate commerce is reserved to the States. This assumption is entirely er-

roneous. The commerce reserved to the States is only that commerce which is completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.

The power of Congress, whatever it may be, must be exercised within the territorial jurisdiction of the several States, and no mere territorial distinction will suffice to define the respective powers of the State and of the Nation. It is of the very essence and purpose of the grant that the Federal power over commerce is exclusive, not only with respect to interstate traffic, but also with respect to intrastate traffic which extends to or affects other States.

The power of Congress over Interstate commerce is exclusive.

The power of Congress over that part of intrastate traffic which extends to or affects other States is exclusive.

The State may regulate that intrastate traffic which is completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.

Rate regulation involves necessarily a determination of the three elements—property, expenses, and revenue. Before the State can regulate rates and affect the element of revenue on intrastate traffic, it must determine the amount of property devoted to intrastate traffic and the amount of expenses incurred in that traffic. On interstate railroads both the property used and the expenses incurred in the conduct of intrastate traffic are inseparably intermixed and interdependent with prop-

erty used and expenses incurred in conducting the interstate traffic. The property used and the expenses incurred in common must be distributed according to some arbitrary rule. In making such a rule, the two authorities, State and Federal, necessarily conflict, because what is added to the charge for the one kind of traffic must be deducted from the charge for the other kind of traffic, and the supreme power, the Federal, must prevail, and the State power must give way. The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the State law.

The determination of the elements of property and expenses is necessary for a judicial review. Congress alone having the power to distribute common property and common expenses between interstate traffic and intrastate traffic, if Congress has not prescribed the rule for distributing property and expenses between the two classes of traffic, there can be no judicial review of the rates established by a State legislature or a State railroad commission, and if the law be such as to make the decision of the Legislature or of a Commission *conclusive* as to the sufficiency of the rate, such a law is unconstitutional.

The State, being unable to determine two of the three elements necessary to be ascertained in order to regulate rates, is, with respect to interstate railroads, without power to affect the third element, the revenue, by any rate regulation whatsoever.

Neither the State nor the railway can be permitted to ignore the fact that an interstate railway is a carrier both for the State and for the Nation, and that, therefore, its charges must be fixed with reference to its performance of duties to others as well as to the particular customer, the State.

Gibbons v. *Ogden*, 9 Wheat. 1, 136, 195.
G. C. & S. F. R'y Co. v. *Hefley*, 158 U. S. 98, 103.
Ex parte Young, 209 U. S. 1, 47.

F.

The Test of the Validity of the State Regulation is to be Found in Its Effect Upon Commerce Among the States.

The genius and character of the Federal power over commerce require that its action be applied, not only to the external concerns of the Nation, but also to those internal concerns which affect the States generally. And, as the power of the States is limited, in that respect, to that commerce which is completely within a particular State and which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government, it is evident that the test of the validity of State statutes or rules which attempt to regulate the rates of intrastate traffic is to be found in their *effect* upon commerce among the States.

The Legislatures, neither by giving their enactments a particular name nor by the use of some form of words, can take away the duty of the courts to consider the nature and effect of a State statute. If it bears upon

commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form; and, in determining whether a statute does or does not burden interstate commerce, this court will look beyond mere form and consider the substance of things. In whatever language a statute or regulation may be framed, its purpose must be determined by its natural and reasonable effect.

If the necessary effect is to interfere with or reduce interstate rates or revenues, or if the natural and reasonable effect is to reduce or destroy interstate traffic, the statutes or regulations are unconstitutional and void.

If the natural and reasonable effect of the statutes or regulations is to destroy commercial relationships for a long time existing in connection with commerce among the States, and to create discriminations with respect to such commerce, which it was the very purpose of the commerce clause to prevent, the statutes or regulations are unconstitutional and void.

If, by reason of the interdependence and indivisibility of interstate traffic and intrastate traffic carried by interstate railroads, it is impossible to regulate or adjust the one kind of traffic without regulating or adjusting the other kind of traffic, then State statutes or rules or orders which attempt to regulate the intrastate rates of interstate railroads are unconstitutional and void.

That the order of the State Railroad Commission complained of in this case is unconstitutional and void for all of these reasons clearly appears from the allegations of the pleadings, and the proof by affidavits in support thereof, as well as from the facts of which judicial notice will be taken by this court.

Gibbons v. *Ogden*, 9 Wheat. 1, 195.
Southern R'y v. *King*, 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. *Texas*, 210 U. S. 217, 227.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 27.
Henderson v. *Mayor of New York*, 92 U. S. 259, 268.

II.

MISLEADING OR ERRONEOUS STATEMENTS IN THE BRIEF FOR APPELLEES CORRECTED, AND CERTAIN ARGUMENTS THEREIN REFUTED.

1. The Quantity of the Commodities Covered by the Rates Complained of Shipped to Consignees Other Than Distillers.

Appellees' counsel on page 4 of their brief state it does not appear from the bill how the quantity of the commodities, covered by the rates complained of, shipped to consignees other than distillers, compares with the quantity of such commodities shipped to distillers, and that the affidavits filed by appellees in opposition to the motion for an interlocutory injunction show the quantity shipped to the former class at the several points of destination was inconsiderable, and that by such affidavits it further appears that there was evidence heard before the Commission showing that at one or more of those points distillers were the only persons receiving such commodities.

It must be borne in mind that consignees other than distillers at the sixteen points of destination named in the record all along, both prior to and after March 25, 1910, were charged and paid appellant's regular standard rates from Louisville, Covington, and Newport on the commodities in question, while the distillers were charged and paid prior to that date special rates thereon, which were considerably lower, but after that date distillers were put by appellant on the same plane of rates with all other consignees of said commod-

ities and required to pay appellant's regular standard rates, without regard to the use they were put to or without discrimination on that account.

It is true the affidavits of appellees show the distillers were the largest consumers of said commodities at those points, but appellees' counsel carefully refrain from referring to the affidavit of Traffic Manager Compton in support of the allegations of the bill, in which he expressly states (Tr. 52):

> The direct and immediate effect of said orders, if enforced, will be to compel said railroad company to transport said articles for any and all persons from and to the points named on basis of said distillers' rates, irrespectively of the uses to which said articles are to be applied; that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified; that *a large proportion of such movement is and will be devoted to uses other than the manufacture and shipment of whiskey*, and to the extent that said articles are not applied to the manufacture of whiskey said railroad company will be compelled to apply said distillers' rates thereon without receiving in any way, shape or form the considerations and benefits that induced it in the beginning and for a long time thereafter to give said rates to distillers, and that the difference between the revenue accruing on said articles on basis of said distillers' rates ordered to be applied thereto by said orders of the Railroad Commission *will amount to many thousands of dollars annually*, and to that extent constitute irrevocable loss of revenue to said railroad company.

2. Assertion of Appellees' Counsel that the Bill is Defective in Not Alleging Facts.

On pages 6-7 of their brief appellees claim the bill fails to make material averments; for example, it is said (p. 6):

> There is no allegation in the bill that the rates fixed are so *unreasonably low* as to deprive the complainant of its property *without compensation*, or that the rates are *confiscatory*, but merely that the rates fixed 'are unreasonably low and unjust.'

On page 50 of their brief appellees' counsel say:

> There is no direct allegation that the rates fixed by the Commission are *unreasonably low*, the only allegation to that effect being found in the statement that the carrier will be restricted to the rates fixed by the Commission, and 'although the same are unreasonably low and unjust, the complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates.'

Again, apparently ignoring the plain and explicit averments of the bill and the first amended bill, appellees' counsel assert at page 51 of their brief:

> Facts and not merely legal conclusions must be alleged to overcome the presumption in favor of the rates fixed by the Commission. In the case at bar no facts are alleged in the bill to show either that the action of the Commission was unreasonable or that the rates fixed are unreasonably low, and not even an allegation of a legal conclusion that the action of the Commission was unreasonable, the only allegation as to that matter being 'although' the

rates fixed by the order complained of are unreasonably low the carrier can not exceed those rates if the order of the Commission goes into effect.

Paragraph XIII of the original bill is as follows (Tr. 21-22):

> Complainant states that its existing rates and charges in effect on its several lines in the State of Kentucky and applicable to its intrastate freight business, affecting the commodities named in said order between the points of origin and points of destination herein mentioned, instead of being extortionate, are not higher than is just and reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic, or with respect to the value of the services rendered to the shippers or public generally; and complainant states it has the lawful right, as inherent to its business as a common carrier of freight and passengers, to charge and receive for the services rendered by it in the State of Kentucky just and reasonable rates, which right to charge and receive such just and reasonable rates is a property right that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with; and complainant states that the Commission's orders, if permitted to be put in force, will deprive it of its said property right without due process of law in violation of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

In Paragraph XX of the first amended bill, which appellees' counsel appear to have entirely overlooked, it is clearly and directly alleged that the rates complained of "are arbitrary, unjust, unreasonable, discriminatory,

and illegal because of the following *facts*, among other grounds, to-wit:" Then follow allegations containing ten separately numbered sets of facts, specifically and concisely stated, without inference or qualification, showing the reasons why said maximum rates prescribed by the Commission on corn, rye, barley, malt, and other articles are of the character alleged, No. 8 of which is as follows (Tr. 81, 82):

> The enforcement of said order will compel complainant to accept upon interstate as well as intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, *and which will not yield to complainant a fair or reasonable compensation for the service performed, and will deprive complainant without due process of law of the fair and reasonable return, to which it is entitled to earn upon the value of the property it devotes to said service or the public use,* with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All these well pleaded facts were fully proven at the hearing by the supporting affidavits. (Compton's affidavit, Clause 8, Tr. 57-8; Goodwyn's affidavit, Clause 9, Tr. 64.)

These extracts from the bill as amended will be sufficient to demonstrate how misleading and unreliable are the statements quoted from the brief for appellees on this point.

3. Does the Record Show the Rates Prescribed by the Commission's order are arbitrary?

On page 53 of appellees' brief we find the following:

> It can not be said that the Commission exceeded its powers by acting *arbitrarily* or in bad faith, as there is *no allegation to that effect*. The mere allegation that the evidence heard bore no 'proper relation' to the question investigated is but a conclusion of law, and even if its truth should be established that fact would not invalidate the action of the Commission if that body in good faith believed that the evidence did show that the rates ought to be reduced.

The well pleaded facts in appellant's pleadings show the rates complained of are arbitrary, for, as alleged therein, and not denied by answer, but admitted on general demurrer thereto, they were prescribed by the Commission, *without any evidence*, proving or tending to prove appellant's existing standard rates were unjust, unreasonable, or extortionate, or that the former special distillers' rates adopted by the Commission are just or reasonable for the services performed.

It is true appellant does not expressly charge the Commission with bad faith, but it is charged that its action was arbitrary, because it was based on *no evidence* of the facts essential to jurisdiction or the exercise of its powers, conceding, for the sake of argument, the validity of the McChord Act, under which it proceeded. Appellees' counsel have stated, more than once in their brief,

> mere allegation that the evidence heard (before the Commission) bore no 'proper relation' to the question investigated is but a conclusion of law.

Speaking of the bill, they say, at page 6:

> It is alleged that the evidence introduced, before the Commission, bore no 'proper relation' to the justness or reasonableness of rates for transporting the commodities and supplies in question when to be used for distilling purposes, and that no evidence was introduced which tended to show what might be a just or reasonable rate on the commodities in question between the points named in the order of the Commission.

Appellees' counsel with avidity have seized upon this averment in the bill, and would have this court infer it was the only one bearing on that subject, and, if it is a mere conclusion of law, that the bill is insufficient to show arbitrary action by the Commission. It is found in the bill as follows (Tr. 20):

> This complainant states absolutely that the evidence that was adduced at said hearing and investigation had *no proper relation* to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes.

We may concede that the criticism leveled against this allegation is sound, and yet there are still abundant direct and positive averments of fact well pleaded in the bill which, being admitted on demurrer, conclusively establish the proposition that the Commission exceeded its powers and the rates complained of were arbitrarily

prescribed by that body. In the same sentence, immediately following the language last quoted, it is alleged in the bill (Tr. 20):

> and it states that *no evidence whatsoever* was adduced at the hearing or investigation aforesaid which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for *all* purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said orders thereon were and are null and void.

Still further the bill contains these unequivocal averments:

> There was *no testimony* by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that became effective on the lines of railroad of complainant on March 25, 1910, and that have been charged, collected, and received by it for such service of transportation on the commodities named on and subsequent to said date, and *no evidence* was adduced in said proceedings that established or tended to establish the unjust or unreasonable nature of said rates or of any of them, or that said rates or any of them were or are extortionate. (Tr. 15, 16.)

Again the bill charges:

> There was *no evidence* introduced in said investigation or considered by said Commission showing or tending to show that this complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky, or between the points of origin and of destination aforementioned, were in and of themselves unjust, unreasonoble, or extortionate. (Tr. 19.)

4. The Record Shows the Commission Exceeded Its Powers and Jurisdiction and the Orders Complained of are Void, Within the Doctrine Announced in Southern Pacific Co. v. Interstate Commerce Commission (Willamette Valley Case), 219 U. S. 43.

This court in the Willamette Valley case, involving a state of facts very similar to those shown in the case at bar, and where the powers of the Interstate Commerce Commission over interstate rates under the Act to Regulate Commerce are substantially the same as those of the Kentucky Railroad Commission over intrastate rates, under the McChord Act (assuming the latter Act, for the sake of the comparison, to be valid), decided, as the syllabi shows, the following propositions:

> 1. An order of the Interstate Commerce Commission, made in consequence of assumption of powers not possessed by it, is void, and its enforcement should be restrained by the courts.
>
> 2. The powers of the Interstate Commerce Commission do not extend to regulating and controlling the policy of the owners of railroads in fixing rates, and it can not substitute for a just and reasonable rate, a lower rate, either on the ground of policy

or on the ground that the railroad was by its former conduct estopped from charging a reasonable rate.

3. Where the shippers do not complain of a new and higher rate because it is intrinsically an unreasonable one, but because, although reasonable, the railroads are estopped to advance it on account of having maintained the lower rate for a considerable period, it is beyond the power of the Commission to direct a restoration of the old rate; and so *held* in regard to the Willamette Valley lumber rates.

4. Where the Commission makes an order restoring a rate that shows on its face it was made on the ground that the railroad was estopped to increase it, the order will not be presumed to have been made for the purpose of establishing a reasonable rate, if it excludes a section from the benefit of the restored rate which amounts to a discrimination against that section.

The suit decided February 20, 1911 (after the orders of the Kentucky Railroad Commission of August 10, 1910, and the order of the lower court of January 12, 1911, herein appealed from, were entered), was brought by the Southern Pacific Company in the Circuit Court of the United States for the Northern District of California to enjoin the enforcement of an order of the Interstate Commerce Commission fixing a rate on lumber in carload lots from Willamette Valley points to San Francisco, the original rate of $3.10, after being in force about nine years, having been increased to $5.00 per ton by the railway carriers from said points and the city of Portland, Oregon. In the complaint before the Commission it was charged by the lumber manufacturers that the increased rate was unreasonable in and of itself;

that from about 1898 there had existed a rate of $3.10 for carrying lumber between the points named, and that upon the faith of this rate and the belief that it would not be changed, large amounts of capital had been invested in lumber mills in the Willamette Valley; that the people in that valley were dependent upon the lumber industry, which would be destroyed and the population would be detrimentally affected if the new rate of $5.00 per ton was continued to be charged. It was also alleged that the $3.10 rate was reasonable in and of itself, and it had been increased, without just cause, upon the theory that the lumber interest in the Willamette Valley was prosperous, and the traffic could, therefore, stand the increase. The railroad companies set up the reasonableness of the $5.00 rate; that the $3.10 rate was unreasonably low and had been fixed solely for the purpose of enabling lumber from the Williamette Valley to reach a market in San Francisco and bay points, which it could not have done if a just and reasonable rate had been exacted. The Commission's order prescribed as a proper rate from certain points in said valley $3.40 and from the remaining points therein $3.65, while the rate from Portland was left as it was at $5.00, although some of the points covered by the order were within a few miles of that city, which was not given the benefit of the reduction. (14 I. C. C. Rep. 61.) The vital question dealt with in the course of this court's opinion in that case was whether the Commission had assumed the power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to sub-

stitute for a just and reasonable rate one which in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive just and reasonable compensation for the service rendered. In answering that question this court held, in substance, that the subject-matter of the complaint of the lumber men was not the intrinsic unreasonableness of the new rate substituted by the railroad companies for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just. This court also held that, while the Commission's opinion contained some sentences which, when segregated from their context, might give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, nevertheless, when the opinion was considered as a whole, in the light of the condition of the record, it clearly resulted that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for sometime to a just and reasonable charge for the service rendered for the future, and this view of the nature and character of the power exerted by the Commission was supported

by the syllabi to the official report of the Commission's opinion, copied in the margin of this court's opinion at page 450.

Furthermore, the exclusion of Portland by the Commission from the benefit of the reduced rate served to show as this court held, the character of the power assumed by that body, and prevented the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate, because, if the assumption were indulged that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding that city from the benefit of the reduced rate. On that point this court observed (pp. 450-51.):

> We can not, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory character.

Now, let us examine the record in the case at bar for the "ear-marks" which bring it within the rulings of this court in that case. The record shows that the special rates on corn, rye, barley, malt, and other articles, to distillers whose distilleries were located at interior points in Kentucky were originally accorded by appellant as far back as 1874, to such distillers as a means of promoting, encouraging, and increasing the manufacture of whiskey and the shipment of the same over

appellant's lines in Kentucky (Compton, Tr., pp. 45-6); that the concessions represented by these special rates on distillers' supplies were first granted at a time when the distilling industry upon said lines was in a demoralized and precarious condition, because of the competition with the manufacturers of cheap whiskey, blenders and rectifiers located on and north of the Ohio River, said industry being carried on at small country points where primarily an abundant supply of pure water could be relied upon, and where it was expected the surrounding farms would furnish some portion of the grain necessary for distilling purposes, and where immunity from city taxes and other expenses incidental to manufacturing within the cities would tend to minimize the cost of production. In the course of time, however, the inroads of the competition referred to, coupled with failure of grain crops, drouths, and other unforseen happenings, placed said country distillers at a material disadvantage, so they were frequently compelled to bring in from distant points grain, water, fuel, and supplies of all kinds, the transportation charges upon which added materially to the cost of their product. The few distillers who were making high grade special brands were not materially affected, but the majority, who were turning out the ordinary grades, found their markets being gradually closed to them by reason of the high cost of their supplies, and the competition mentioned. (Ib. 49-50.) In this situation, appellant, finding itself about to be deprived of the whisky traffic, which it had, as a matter of business policy, labored to build up and maintain, made common cause with the distillers on its lines, and voluntarily gave to them an unusually low scale of rates

on their grain and supplies in the expectation and assurance that they would be withdrawn whenever the conditions changed for the better. For these reasons appellant never guaranteed said rates or promised to protect them beyond the end of the current distilling season, and invariably thereafter said rates were restored, revised, and modified, from season to season, as existing conditions seemed to require. As a result of this co-operative action, the distilling industry upon appellant's lines in Kentucky gradually recovered its footing, and at the time this suit was instituted there were and still are forty-eight (48) of these country stations on its lines in that State at which distilleries are located, the names of which are stated in Traffic Manager Compton's affidavit. (Tr. 51-2.)

The disadvantages under which said industry labored in the beginning and for many years thereafter have entirely disappeared, and it is not only no longer in need of the special rates, which, under the conditions then existing, appellant gladly gave, but in the past few years enormous fortunes have been made from the distilling industry along appellant's lines in Kentucky, and there is no longer any reason or justification for extending thereto lower rates on any commodities necessary in the manufacture and shipment of whiskey than the standard rates of appellant, as applied to the same commodities when intended for and devoted to other uses. During the time said special rates were in effect appellant was influenced solely by the representations of said distilling interests that without such assistance the distilleries could not be kept in operation, and by the knowledge that their closing down would take away from appellant a large and fairly profitable traffic *in the trans-*

portation of whiskey from said distilleries to the markets of consumption, but it was never contemplated or expected that said special rates would be perpetuated or even extended beyond the end of the current season, which the rate-making order of the Commission, if enforced, would accomplish. (Compton, Tr. 50-51, Goodwyn, Tr. 59-60.)

An examination of the complaint before the Commission of the twenty-three (23) corporate distillers at sixteen (16) out of forty-eight (48) of the distillery stations is important in this connection. After setting out the fact that appellant had "for *many years* prior to March 25, 1910," transported over its lines the various commodities and at the rates shown in Exhibit A, with their complaint, and the increased rates, designated as new rates in said Exhibit, we find in said complaint these allegations (Tr. 33):

> Plaintiffs say that each and all of said increased rates so charged, collected, and received from said points of origin to the respective plants of each of the plaintiffs, as shown in said Exhibit, *wherein the same are in excess of said former rates,* are extortionate, unjust, and unreasonable.

Then immediately follows the statement of their only reason or ground for alleging the increased rates "are extortionate, unjust, and unreasonable," as follows:

> That defendant as aforesaid *had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants, upon the faith of said former rates, and had maintained said former rates for many years, as just and reasonable rates,* all of which were and are

> fairly remunerative, and are and were *no more* than just and reasonable compensation for the transportation of said commodities to and from said points.

To the last proposition, that the special rates referred to were "no more" than just and reasonable compensation for the transportation of said commodities, we quite agree with the distillery corporations that filed said complaint. Our contention is that said special rates were much *less* than such compensation at the time they were increased by appellant.

Now, what is the prayer in the complaint of said corporate distillers? It is as follows (Tr. 33):

> Wherefore, plaintiffs pray that this Honorable Commission, after due notice herein and investigation, make and fix just and reasonable rates to and from all points and upon all commodities as shown in said Exhibit A, *and that said rates be fixed no higher than those charged, collected, and received by the defendant for the transportation of said commodities to and from said points prior to the cancelation of said former rates effective March 25, 1910, as hereinbefore stated;* and plaintiffs pray for all other necessary orders in the premises.

Thus, it appears that the *gravamen* of said complaint was the supposed equitable estoppel urged against appellant's right to increase or withdraw its said special rates on distillers' supplies, and in lieu thereof to put in its regular standard rates charged, collected, and received from all consignees alike, which were not alleged to be unjust or unreasonable for any other reason or upon any other ground than the one expressly stated in said complaint, viz.:

> That defendant had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants upon the faith of said former rates.

Appellant's answer traversed the averments of said complaint, relying upon an equitable estoppel, and thereby made up the material and controlling issue to be tried and determined by the Commission. (Tr. 34-5.)

The vital question before the Commission, therefore, was not whether the existing rates were unjust or unreasonable in and of themselves, but whether appellant was equitably estopped from increasing its former special rates, and on that ground should be compelled to restore such special rates.

It is interesting and instructive in this connection to note what the three Federal Judges in the court below, after a critical and close examination of the record, held to be the issues presented to the Commission. On this point in their opinion they state (Tr. 89):

> Plainly the issues before the Commission involved the question whether the rates, which had for years prior to March 25, 1910, been charged for the carriage of distillers' supplies and products within the State of Kentucky, *should be restored*, and whether the difference between those rates and the rates which had been put into effect March 25, 1910, and thereafter exacted down to the filing of the petition before the Railroad Commission, was recoverable as reparation.

Further along the court below, speaking of the rates which the Commission by its order restored, said (Tr. 90):

As we understand these rates, they are the same as the rates that were prior to March 25, 1910, charged for the carriage of distillers' supplies and products, but that they are by the order extended *to all shippers* of like packages and commodities between the points and along the lines named, without regard to the occupations of the shippers; whereas, the rates put in force by the railroad company on and after March 25, 1910, were the same as those previously exacted of shippers between said points on said lines who were *not* engaged as distillers. In other words, the uniform standard of rates as fixed by the railroad company on March 25, 1910, was that previously charged to *non-distillers*, while the uniform standard fixed on August 10, 1910, by the Railroad Commission was the one existing prior to March 25, 1910, *in favor of distillers.*

The Commission delivered no opinion stating the *facts* on which its conclusions were reached, but in its orders of August 10, 1910, merely recited the steps taken in the proceeding instituted by the distillery corporations against appellant, declared it was of opinion the existing rates of appellant "are extortionate, unjust, and unreasonable," and fixed the same rates in force prior to March 25, 1910, stating it was of opinion they "are just and reasonable." (Tr. 27-31.)

We have already seen that the Commission, by its general demurrer to the bill as amended, alleging that *no evidence* was introduced before the Commission to prove or tending to prove the new or existing rates were unjust or unreasonable, or that the old or former special rates were just or reasonable for the service performed, have *admitted* that no such evidence was intoduced or heard by them, and starting with this important admis-

sion (which is equivalent to a confession that the rates complained of were *arbitrarily* fixed by them), we have not far to go, nor is the search difficult, to find the true ground on which their orders were made.

It is found in the counter-affidavits filed by appellees in opposition to the motion for an interlocutory injunction. In those of appellees, Siler and Finn, which are alike in all substantial respects, if not in every respect, the only statement of *fact* stated by them to have been shown in the proceeding before the Commission, is as follows (Tr. 66 and 67, 68):

> Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force *only a short time*, and that prior to the time those rates were put in force plaintiff had *for a number of years* been collecting from the complainants *no greater rates* than those herein complained of.

If there had been any other *facts* bearing upon the question of reasonableness, it is reasonable to assume that these Commissioners would have stated them in their affidavits, carefully drawn by their counsel and filed within three weeks after the bringing of this suit by appellant. But this court has held that "the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done." (*Interstate Commerce Commission* v. *Chicago Great Western R'y Co.*, 209 U. S. 119-20.) Again appellees, Siler and Finn, in their affidavits, shed some more light on this subject by stating (Tr. 66 and 68):

> The evidence did not show that the conditions which existed at the time of the hearing of said com-

> plaint differed from the conditions which existed during the years when plaintiff *voluntarily* charged and collected from the complainants the rates fixed by said Commission of which complainant is now complaining.

The fact that a carrier has even voluntarily put in a low or reduced rate

> furnishes no criterion for the measurement of the power of a Legislature (or Commission, we may add) * * * *Nor does it furnish a standard by which to measure the reasonableness of the matter enacted by the Legislature.* The action of the company upon its own volition, *purely as a matter of internal administration, and in regard to the details of its business*, which it has the right to change at any moment, furnishes *no argument* for the existence of a power in the Legislature to pass a statute in relation to the same business imposing additional burdens upon the company. (*Lake Shore & M. S. R'y Co.* v. *Smith*, 173 U. S. 684, 697.)

So, W. A. Miller and R. H. Edelen, officers respectively of two of the distillery corporations in the proceeding before the Commission, present another pair of twin affidavits, drawn by their own as well as appellees' counsel and state what they deemed material, and doubtless what their testimony had been as witnesses in said proceeding, which controlled and induced the action of the Commission therein, as follows (Tr. 70, 71, 72):

> The rates as fixed by said Commission, by the orders aforesaid, had *for many years* prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in said orders to and from dis-

tilleries located at the points named in said orders.
* * *

That if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers, *that all the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned, and that the value of all of said distilleries will be largely depreciated.*

Not a hint in any of these four affidavits is given of any evidence before the Commission showing or tending to show the new or standard rates were in and of themselves unreasonable, or that the old or special rates were reasonable for the service rendered or to be rendered by appellant. On the contrary, every material statement therein bearing on the character of the existing rates as compared with the former rates goes to support the equitable estoppel relied on in the complaint of the distillery corporations, and sustains our contention that the Commission exceeded its powers under the McChord Act (assuming that Act to be valid), and its orders are, therefore, void.

Moreover, the parallel between the case at bar and the Williamette Valley case may be carried further, when we consider the discriminations and preferences (in violation of Sections 817 and 818, Kentucky Statutes and Sections 2 and 3 of the Act to Regulate Commerce) established by the Comimssion's orders against the dis-

tillers whose distilleries are located at the other thirty-two (32) interior stations on appellant's lines in Kentucky, which we discussed in our original brief and illustrated by the map attached thereto. (Part IX, pp. 139-148.) These other distillery points occupy relatively the same attitude as the city of Portland, whose lumber men were discriminated against in the Willamette Valley case. Indeed, many of them, as shown on said map, are much nearer Louisville, Covington, and Newport, respectively, than the points to which the reduced rates apply, yet they were not given the benefit of them, but left to continue paying appellant's standard rates. The excuse can not be offered by appellees that such gross discrimination, in contravention of the State and Federal Statutes, resulted from the fact that the distillers at the stations discriminated against filed no complaints, for the McChord Act, under which the Commission proceeded, plainly provides:

> When said Commission shall receive information or have reason to believe that such (extortionate) rate or rates are being charged, collected, or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible.

The statute requires the Commission to proceed in the same manner where there is no complaint, as where there is one filed. Appellees' counsel admit in their brief (bottom of page 41) "the Commission is not restricted to the reduction of rates upon complaint." All that is necessary is for it "to receive information or have reason to believe." If appellant's standard rates on distillers' supplies from the three (3) points of origin to

the sixteen (16) points of destination named in the proceeding instituted by the Greenbrier Distillery Company and others were in truth and in fact held to be extortionate or unreasonable, they were likewise extortionate or unreasonable from the same points of origin to all the other thirty-two (32) distillery stations in the interior of Kentucky; and the Commission necessarily received information to that effect in the investigation and hearing of that proceeding, or had reason to so believe, *provided there was any evidence to prove or tending to prove appellant's said standard or existing rates from the points to the points involved therein were extortionate or unreasonable.* The fact that the Commission did *not* discharge its statutory duty and extend its order restoring said special rates on distillers' supplies to two-thirds of the distillery stations on appellant's lines in the interior of Kentucky shows conclusively there was no evidence introduced or heard by that body in said proceeding proving or tending to prove appellant's existing or standard rates were extortionate or unreasonable; and it did not, therefore, "receive information" therein that they were extortionate or unreasonable, or have "reason to so believe." So we are forced to the conclusion that its action was based on some other ground, viz.: That appellant was estopped to advance its special rates by reason of the evidence that was actually introduced and heard by the Commission, showing the facts and circumstances under which said special rates were originally put in and kept in force by appellant for many years, and the hardship that might result to the plaintiffs in the proceeding aforesaid by reason of such advance. In other words, the Commission assumed

powers not possessed by it, and its rate-making order is, therefore, void; and its enforcement should be restrained, just as was done by this court, where the Interstate Commerce Commission assumed to exercise similar powers, under like circumstances, in the Willamette Valley case.

5. The Nature of the Hearing to Which a Carrier is Entitled With Respect to the Reasonableness of Rates Prescribed for Its Future Services Under the Decision of this Court in Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota, 134 U. S. 418.

Appellees' counsel in their brief (pp. 17-36) make a labored, but we think futile, effort to establish the proposition that this court in the case of *Chicago, Milwaukee & St. Paul R'y Co.*, v. *Minnesota*, 134 U. S. 418, only intended to decide that the carrier was entitled to a hearing of some kind at some stage of the proceeding to fix its rates, and did not hold it must be afforded a *judicial* hearing upon the question of the reasonableness of the rates prescribed for its services. We referred to and discussed the facts and decision in that case in our original brief (pp. 88-90; 93-94).

Appellees' counsel in their brief (p. 17), speaking of that case, say:

> The State court had held that, although the rates had been fixed *without a hearing*, there could be no judicial inquiry as to the reasonableness of the rates, even though they might be confiscatory.

Again they state at page 26 of their brief:

> In the Minnesota case the Supreme Court of that State had precluded all judicial inquiry as to whether or not the rates were *confiscatory*, and this court was forced to hold that the Statute, as thus construed, was void, there having been *no hearing* before the rates were fixed.

Now, in point of fact, the rates on milk in the Minnesota case had *not* been fixed "without a hearing," such as appellees' counsel appear to admit was essential to their validity, where a judicial hearing is unprovided for. On an examination of the elaborate statement of that case by Mr. Justice Blatchford, it appears that a statement of the complaint of the Board of Trade Union of certain towns in Minnesota filed before the Commission was first forwarded by the Commission to the railway company, which was called on to satisfy or answer it, and the railway company's Assistant General Manager responded thereto in writing. Thereafter on the day fixed for the hearing the railway's authorized attorney appeared at the office of the Commission in St. Paul; the Commission then proceeded to investigate the complaint; and found the railway company's rates for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis were 3 cents per gallon in ten-gallon cans; that such charges were unequal and unreasonable; and that a rate of 2½ cents per gallon in ten-gallon cans was an equal and reasonable rate for such services. So, a hearing before the Commission was in fact afforded the carrier in that case.

In response to the alternative writ of mandamus, issued by the Supreme Court of Minnesota to enforce the order of the Commission, the railway company urged that the rate of 3 cents was a reasonable, fair, and just

rate; that the rate of 2½ cents was not a reasonable, fair, or just compensation for the service rendered; and that the establishing of such rate by the Commission was *pro tanto* a taking of its property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States. When the case came on for hearing in the State Supreme Court, the railway company applied for a reference to take testimony on the issue thus raised as to whether the rate fixed by the Commission was reasonable, fair, and just, which reference was denied by that court, and a judgment was thereupon entered directing compliance with the Commission's order, which was held to be final and conclusive, as to the justness and reasonableness of the rates prescribed thereby. In other words, the State Supreme Court held the railway company was not entitled to a judicial inquiry as to the reasonableness of such rates, under the terms of the State Statute, which, so construed, this court on writ of error held to be in conflict with the Constitution of the United States, as depriving the railway company of its property without due process of law, and denying to it the equal protection of the laws.

This court will notice that the railway company's response in the Minnesota case was very general in its averments that the rate it was charging was fair, just, and reasonable, and that the Commission's rate was unjust and unreasonable, without stating specific facts, as appellant has in the case at bar, yet this court held said response to be sufficient to raise the material issues.

In that case the State Supreme Court construed the statute of Minnesota precisely as we, as well as counsel for appellees in the case at bar, insist this court should

construe the provisions of the McChord Act, as follows: (38 Minn. 281, 134 U. S. 452):

> It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the Commission (assuming that they have proceeded in the manner pointed out by the Act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the Act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the Commission. Indeed, the language of the Act is so plain on that point that argument can add nothing to its force.

This court will observe in that case the counsel for the plaintiff in error contended, as we do here (Ib. 446):

> The court erred in holding that the schedules of rates fixed by said Commission were final and conclusive as to what were lawful, equal and reasonable rates, and that they 'are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable', instead of simply holding them as advisory and *prima facie* or presumptively equal, and subject to review by the court.

It will be noticed also that counsel for the defendant in error in that case argued for the validity of the statute, as do appellees' counsel here, as follows (Ib. 447):

> It will relieve the discussion of this case from some embarrassment, if it is borne in mind that, in the case made by plaintiff in error to the alternative writ, no allegations are made that the enforcing the rate established by the board would so affect the earnings of the road as to impair its ability to meet any of its obligations or to seriously affect its revenues.
>
> Neither is it claimed by plaintiff in error that it is protected by an express contract or charter exemption from legislative interference in the matter of fixing rates, the company contenting itself as above stated, with the allegation that the Commission 'unjustly, unreasonably and oppressively' fixed the rate, and that the establishment of such rate was a *pro tanto* taking of the property of the plaintiff in error.

The Minnesota statute was held by this court to be void, because it attempted, as construed by the State Supreme Court, to make the rate-making order of the Commission, a non-judicial body, *final and conclusive* on the question of the *reasonableness* of the rates prescribed for the service rendered, not on a question of *confiscation*. The rate fixed by such a Commission does not have to be so low as to amount to confiscation, as contended by appellees' counsel (at page 21 of their brief), before the carrier becomes entitled to a judicial inquiry. The right of the carrier to a judicial inquiry on the question of the reasonableness of rates prescribed by a Commission is guaranteed by the Federal Constitution, not-

withstanding a hearing in fact was accorded the carrier before the Commission fixed and promulgated the rates complained of in that case.

In the late case of *Ex parte Young*, 209 U. S., at page 147, this court reaffirmed the foregoing doctrine, as follows:

> If the law be such as to make the decision of the Legislature or of a Commission *conclusive* as to the *sufficiency* of the rates, this court has held such a law to be unconstitutional. *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418.

The court's attention, in this connection, is called to the opinion of circuit judge, now Mr. Justice McKenna, in *Southern Pacific Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. 236; and to the opinion of district judge, now circuit judge, Hook, in *Western Union Tel. Co.* v. *Myatt, State Solicitor, et al.*, 98 Fed. 335, both of which fully sustain our contention that the rate orders of the Kentucky Railroad Commission can not be lawfully made final and conclusive or beyond judicial review upon the question of the reasonableness of the rates prescribed thereby.

In the first of these cases the provision of the Constitution of California making the rates fixed by the Board of Railroad Commissioners conclusively just and reasonable was held to be in conflict with the Fourteenth Amendment to the Constitution of the United States and void; and in the second case the Act of the Kansas Legislature creating the Court of Visitation was held to be invalid under the Constitution of that State, in so far as it attempted to confer on that body judicial powers in re-

spect of the same matters of which it was given legislative and administrative jurisdiction, and that a proceeding before that so-called court, in which it was sought to secure a judgment on the reasonableness of rates prescribed by it to be charged by a railroad or telegraph company, would not be due process of law within the meaning of the Federal Constitution.

In the cases of *Interstate Commerce Commission* v. *Union Pacific Railroad Company, et al.*, decided by this court January 9, 1912, Mr. Justice Lamar delivering the opinion, the limitations upon the finality of the orders of the Interstate Commerce Commission, and the instances wherein such orders had so far been held to be subject to judicial review, were stated as follows:

> There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final, unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved had been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*,

215 U. S. 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 544; *Int. Com. Com.* v. *Alabama Midland*, 168 U. S. 146, 174.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

Were we to concede that the McChord Act is valid and that the rate-making orders of the Kentucky Railroad Commission thereunder are final, unless they come within one or more of the exceptions defined by this court in those cases, with respect to the orders of the Interstate Commerce Commission, still the orders herein complained of clearly come within all of these exceptions, save perhaps the fourth, and are, therefore, subject to judicial inquiry.

Besides under the doctrine laid down by this court in *Louisiana R. R. Commission* v. *Cumberland Telephone Co.*, 212 U. S. 414, 420, appellant is not confined to the Federal questions involved herein, but, under the aver-

ents of the bill, claims the right to have the question of the *reasonableness* of the rates complained of inquired into by this court, as appellant, by the laws of the State of Kentucky, is entitled to just and reasonable compensation for the service it performs as a common carrier. (Original brief, pp. 94-95.)

6. The Contention of Appellees' Counsel that the Kentucky Railroad Commission Possesses Judicial Powers is Untenable.

Appellees' counsel, to sustain the finality of the rate-making orders of the Kentucky Railroad Commission claimed by them, are driven in their brief (pp. 42-46) to the contention that said Commission is vested with judicial powers. They say this was done by Section 218 of the State Constitution, where the Commission is granted specific power to relieve railroad carriers from the operation of the long and short haul provision of that section, but we think we have demonstrated in our original brief (pp. 48-52) under the authorities there cited that such power is *not judicial*, but purely *executive* or *administrative*. On this point we cite an additional case, recently decided by this court, viz.: *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.

But it is further said by appellees' counsel (brief, p. 44) that the State Constitution (Section 209) provides that the powers of the Commission shall be regulated by law, and that until otherwise provided by law it should have the same powers and jurisdiction prescribed and allowed by law to the then existing Railroad Commission. It is then claimed (brief, pp. 45, 46) that prior to the adoption of the present Constitution (September 28,

1891), the latter Commission had the same power to award reparation to shippers the present Commission has (which is none at all, as we think we have shown in our original brief, Part VIII, pp. 123-138); and that "prior to that time it had had the authority to make such an award with the force and effect of a judgment," citing Gen. Stats., Ed. 1888, p. 1028.

Now, the Statute of 1888 referred to did give the former Railroad Commission, in the hearing and determination of complaints against a railroad company for extortion and discrimination, authority to "award judgment," but it was therein expressly provided that such awards should be filed with the clerk of the circuit court in the proper county, and that any party dissatisfied therewith might file a traverse thereof with such clerk, who was required to docket the same for trial in that court, with the right of such party to a jury if the amount exceeded twenty dollars. So, in point of fact, the power conferred was not judicial, but administrative, just as is the like power vested in the Interstate Commerce Commission to make awards of damages for reparation, which are subject to judicial review and enforcible by the courts. (Section 16, Act to Regulate Commerce, as amended June 18, 1910.) Nor can the provision referred to in Section 209 of the State Constitution of 1891, viz.: "the powers and duties of the Railroad Commissioners shall be regulated by law," be depended upon to support the proposition that the present Commission has been lawfully vested by the Legislature with judicial power, for Sections 27, 28, 109, and 135 of the same instrument stand as insurmountable barriers to such a construction. (Appellant's original brief, p. 7.)

By Section 28, it is declared:

> No person or collection of persons being of one of those departments (legislative, executive, and judicial) shall exercise *any power* properly belonging to either of the others, except in the instances hereinafter *expressly* directed or permitted.

It is not pretended by appellees' counsel that the Legislature is by Section 209 "*expressly* directed or permitted" to confer upon the Railroad Commission, an executive or administrative body, judicial power. Furthermore, by Section 109 of the Constitution, "the *judicial power* of the Commonwealth, both as to matters of law and equity" (that is, all of such power) is vested in certain *named courts*, and by Section 135 thereof the door is absolutely closed against the Legislature creating any other courts in this language:

> No courts, save those provided for in this Constitution, shall be established.

But, as decided in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, even if the Commission possessed judicial powers, as well as legislative powers, under the State Constitution, the making of a rate, being a legislative Act, by such a Commission, after hearing the interested parties, is not final and conclusive or *res judicata* upon the validity of the rate, when questioned by those parties in a suit in court. Mr. Justice Holmes, delivering the opinion of a majority of the court in the Prentis case, said (*Ib.* 227):

> It does not matter what inquiries may have been made as a preliminary to the legislative act. Most

legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. * * * So when the final act is legislative the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a State Constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States.

7. **Nature of the Action of the Courts, Were an Appeal Allowed, Under the McChord Act, From a Rate-making Order of the Commission.**

Appellees' counsel in their brief say (p. 23):

> If, however, a right of appeal to the courts were given, the action of the courts upon the appeal would be legislative merely, as held in *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, and as the railroads have no constitutional right to legislative action by the courts, they can not complain that no such right of appeal is given.

This statement is quite misleading, and shows a failure to understand the contention of appellant's counsel with respect to the right of appellant to a judicial inquiry, as well as a misapprehension of the grounds on which this court decided the Prentis case. The Virginia

Constitution provides a right of appeal by the carrier from a rate-making order of the Corporation Commission to the Supreme Court of Appeals of that State, and that the latter court, on such appeal and the evidence heard by the Commission, shall have power to affirm the rates prescribed by the Commission, or to fix a different rate in lieu thereof, and reverse the order appealed from, with direction to enter its order prescribing the rate found on the appeal to be just and reasonable. Of course, this unusual power to fix the rates of a railroad carrier is legislative power vested in the Virginia Court of Appeals. In the language of this court that court had "the last legislative word."

We contend for no such legislative power in the Kentucky courts, but we do contend that the McChord Act denies to railroad carriers any appeal to such courts from the rate-making orders of the Commission, wherein said courts may exercise their *judicial* powers to review the justness or reasonableness of the rates thereby prescribed, and if such rates, upon an investigation and hearing, affording due process of law, are found to be unreasonable or insufficient to yield just compensation for the "services thereafter rendered," said courts may reverse the action of the Commission and declare its orders void and unenforcible on that account.

Our contentions, arguments, and citation of authorities on this branch of the case are fully presented in Part V of our original brief, pages 77-101.

8. **The Remedy Provided in the McChord Act for the Enforcement of the Commission's Rate-making Orders is Exclusive of All Others.**

In the brief for appellees (pp. 38-40) it is claimed that the Commission has power and authority to enforce obedience to its rate-making orders by civil proceedings. They do not pretend there is any express statute which so provides, nor do they cite any decision of the Court of Appeals of Kentucky, holding such a remedy exists. The Commission has been granted no *general* powers to enforce the rates it prescribes for the observance of railroad carriers otherwise than by indictment to recover the statutory penalties, as provided in the McChord Act.

It is true, under Section 821, Kentucky Statutes (Appendix to our original brief, p. 197), it is made the duty of the Commission "to see that the *laws* relating to all railroads, except street, are faithfully executed." But that requirement does not clothe the Commission with power to enforce its rate-making orders, except as provided in the McChord Act, the only statute undertaking to grant to it power to make rates.

Section 821, however, was sufficient (as held in *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 120 Ky. 91) to vest in the Commission power to make an order under the special law imposing the duty on a railroad company to operate daily, except Sunday, at least one passenger train over its line each way. That suit did not relate to rates at all, but was brought by the Commonwealth's Attorney in the name of the Commonwealth to compel compliance with this special law, after the Commission had made an order requiring the railroad company to do so. There the duty to operate

passenger trains was one owing to the Commonwealth, having been imposed by a particular statute, and it was proper to bring the suit against the railroad company in the name of the Commonwealth.

We need not go further than the McChord Act itself to ascertain the *manner* in which its provisions are to be enforced. At the close of Section 1 thereof it is provided that if the railroad company or any officer, agent, or employe charge, collect, or receive a greater or higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by the Commission, each shall be deemed guilty of extortion, and upon conviction shall be fined and subjected to the severe penalties therein set forth.

Section 2 defines the courts which shall have jurisdiction of the offenses of extortion for which the railroad company, its officers, agents, and employes, respectively, may be prosecuted.

Section 3 provides that the prosecutions under the Act shall be by *indictment*, and Section 4 provides that all such prosecutions shall be commenced within two years after the offense shall have been committed.

When the title of the Act is examined we find among its objects and purposes therein stated these: "*and prescribing the manner of enforcing the provisions of this Act*, and penalties for the violation of its provisions." (Section 820a, Kentucky Statutes; our original brief, pp. 3-5.)

We insist, therefore, upon the application of the maxim, *expressio unius est exclusio alterius*.

Upon the grounds and authorities presented herein and in our original brief, it is respectfully submitted

that the order appealed from should be reversed, with direction to the court below to grant the interlocutory injunction prayed for by appellant.

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Points and Authorities.

I.

THE ORDER OF THE RAILROAD COMMISSION OF KENTUCKY WOULD, IF ENFORCED, DIRECTLY AND NECESSARILY AMOUNT TO AND OPERATE AS AN INTERFERENCE WITH AND A REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID ON THAT ACCOUNT.

A.

Appellees Misapprehend the Facts Upon Which this Proposition is Maintained.

B.

In Addition, the Facts Heretofore Set Forth in Support of this Proposition there is to be Considered the Fact, of Which the Court Will Take Judicial Notice, that the Elements of Intrastate Traffic Handled on Interstate Railroads and the Elements of Interstate Traffic Handled on Such Railroads are so Intermixed, Interdependent, Indivisible and Inseparable that it is Impossible in Connection with Such Railroads to Regulate or Adjust the One Kind of Traffic Without Regulating, Adjusting and Interfering with the Other Kind of Traffic.

Northern Pacific R'y Co. v. Keyes, 91 Fed. 47, 52.

"The Workings of the Railroads," by Prof. Logan G. McPherson, Lecturer on Transportation at Johns Hopkins University, (p. 91).

"American Railway Transportation," by Mr. Emory R. Johnson, Assistant Professor of Transportation and Commerce, University of Pennsylvania, member Isthmian Canal Commission, 1889-1903 (pp. 272-274).

South & North Alabama Railroad Co. v. Pilgreen, 62 Ala. 307.
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 37.

C.

The Authorities Cited by Appellees Are Not in Conflict With Appellant's Proposition; and Where Appellees' Conclusions of Law in this Respect are Opposed to the Proposition, Such Conclusions of Law Are Not Supported by the Authorities Cited.

Shepard v. Northern Pacific R'y Co., 184 Fed. 765.
Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204.
County of Mobile v. Kimball, 102 U. S. 691.
Gibbons v. Ogden, 9 Wheat. 1, 195.
The Daniel Ball v. United States, 10 Wall. 557, 564.
Western Union Telegraph Co. v. Texas, 105 U. S. 460.
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27.
Sands v. Manistee River Improvement Co., 123 U. S. 288.
Missouri Pacific R'y Co. v. Larabee Flour Mills Co., 211 U. S. 612.
McNeill v. Southern R'y Co., 202 U. S. 543.
Allen v. Pullman's Palace Car Co., 191 U. S. 171, 180.
Pullman Co. v. Kansas, 216 U. S. 56.
Employer's Liability Cases, 207 U. S. 463.
Southern Railway Co. v. United States, 222 U. S. 20.

New York, *ex rel.* Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 26.
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 30.
In re Rahrer, 140 U. S. 545, 562.
Southern R'y Co. v. King, 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. Texas, 210 U. S. 217, 227.
Henderson v. Mayor of New York, 92 U. S. 259, 268.
Houston & Texas Central R. R. Co. v. Mayes, 201 U. S. 321, 328, 331.
Farmers Loan & Trust Co., 116 U. S. 307.
Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503.
Louisville & Nashville R. R. Co. v. Eubank, 184 U. S. 27.
Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579.
Missouri, Kansas & Texas R'y v. Haber, 169 U. S. 613.
Lake Shore & Michigan Southern R. Co. v. Ohio, 173 U. S. 285.

D.

The Federal Power Over Commerce is Exclusive Whenever a Uniform Rule of Regulation is Required.

Gibbons. v. Ogden, 19 Wheat. 1, 196, 224, 225, 231.
Cooley v. Board, 12 How. 299, 319.
State Freight Tax, 15 Wall. 232, 280.
Welton v. Missouri, 91 U. S. 275, 280-282.
Henderson v. Mayor, 92 U. S. 259, 272.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203-204.
Northern Securities Co. v. United States, 193 U. S. 197, Dissenting Opinion of White, J., the Chief Justice, Peckham and Holmes, JJ.
The Federalist, Nos. 7 and 22.
Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 100-101.
N. Y., N. H. & H. R. R. Co. v. I. C. C., 200 U. S. 361, 391.
Passenger Cases, 7 How. 282, 399-400.

E.

The Federal Power Over Commerce is Exclusive Not Only With Respect to Interstate Traffic, But Also With Respect to Intrastate Traffic Which Extends to or Affects Other States.

Gibbons v. Ogden, 9 Wheat. 1, 136, 195.
G. C. & S. F. R'y Co. v. Hefley, 158 U. S. 98, 103.
Ex parte Young, 209 U. S. 1, 47.

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The Test of the Validity of the State Regulation is to be Found in Its Effect Upon Commerce Among the States.

Gibbons v. *Ogden*, 9 Wheat. 1, 195.
Southern R'y v. *King*, 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. *Texas*, 210 U. S. 217, 227.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 27.
Henderson v. *Mayor of New York*, 92 U. S. 259, 268.

II.

MISLEADING OR ERRONEOUS STATEMENTS IN THE BRIEF FOR APPELLEES CORRECTED, AND CERTAIN ARGUMENTS THEREIN REFUTED.

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3. **Does the Record Show the Rates Prescribed by the Commission's Order are Arbitrary?**

4. **The Record Shows the Commission Exceeded Its Powers and Jurisdiction and the Orders Complained of Are Void, Within the Doctrine Announced in Southern Pacific Co. v. Interstate Commerce Commission (Willamette Valley Case), 219 U. S. 43.**

14 I. C. C. Rep. 61.
Interstate Commerce Commission v. Chicago Great Western R'y Co., 209 U. S. 119-20.
Lake Shore & M. S. v. Smith, 173 U. S. 684, 697.
Ex parte Young, 209 U. S. 147.

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Ex parte Young, 209 U. S. 147.
Southern Pacific Co. v. Board of Railroad Commissioners of California, 78 Fed. 236.
Western Union Telegraph Co. v. Myatt, State Solicitor, *et al.*, 98 Fed. 335.
Interstate Commerce Commission v. Union Pacific R. Co., *et al.*, decided January 9, 1912.
Louisiana R. R. Commission v. Cumberland Telephone Co., 212 U. S. 414, 420.

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Hannibal Bridge Co. v. United States, 221 U. S. 194.
General Statutes, Ed. 1888, p. 1028.
Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210.

7. **Nature of the Action of the Courts, Were an Appeal Allowed, Under the McChord Act, From a Rate-Making Order of the Commission.**

8. **The Remedy Provided in the McChord Act for the Enforcement of the Commission's Rate-making Orders is Exclusive of all Others.**

Kentucky Statutes, Sec. 820a, 821.
Commonwealth v. Louisville & Nashville R. R. Co., 120 Ky. 91.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~210~~ 23

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Appellant,

versus

ADAM T. SILER, LAURENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, - - - - - - - Appellees.

Supplemental Brief for Appellees.

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For Appellees.

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Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 507.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellant*,

vs.

ADAM T. SILER, LAURENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - - *Appellees.*

SUPPLEMENTAL BRIEF FOR APPELLEES.

I.

The McChord Act does not deny due process of law because it fails to provide for a review by the courts of the reasonableness of rates prescribed by the Railroad Commission.

That due process of law does not require that the reasonableness of rates prescribed by an administrative body pursuant to legislative authority shall be subject to review by the courts, for any other purpose than to determine whether or not they are so low as to amount to the taking of property without due process of law, and

that the right of review for that purpose need not be expressly given by statute, is so well settled by a long line of cases, as shown in our original brief, pp. 13-21, that it seems that it ought not to be necessary to discuss that question at this late day.

Some of the statements of counsel for appellant, however, both in their original brief and in their reply brief as to what was decided by this court in Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, make it necessary to again consider that case. The court there held the statute in question to be void because it did not provide for a hearing by the Commission. The court said:

> "No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the Commission, the company appeared before it by its agent, and the Commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at."

There is nothing to show that the carrier was given any opportunity to be heard, and the court distinctly says that while there was some investigation it did not appear what the character of that investigation was. The mere fact that the agent of the company appeared before the Commission does not show that the carrier

had a hearing, or was given any opportunity to introduce any evidence, and the court says, in effect, that there was no hearing, or at least that it did not appear that there was a hearing, there being nothing to show what the character of the investigation was, or how the result was arrived at.

As the statute did not provide for a hearing it can not be readily inferred that there was such a hearing as constituted due process of law. But however that may be, we are now trying to ascertain the ground upon which the court based its decision, and the fact that the court said that neither the nature of the investigation nor how the result was arrived at appeared, and commented upon the fact that the statute provided for no notice or hearing, shows that the court considered that no hearing was had.

Besides, the court was passing upon the validity of the statute *as construed by the Supreme Court of Minnesota.* Under that construction the carrier was not entitled to a hearing before the Commission, and was not entitled to a hearing before the courts even as to whether or not the property of the carrier was taken without due process of law.

This court made it clear that a hearing by a court is not necessary to constitute due process of law, and that a hearing before the Commission was all that was required, provided the Commission possessed the "machinery of a court of justice." The statement that no summons or notice was provided for, and no opportunity to introduce witnesses, shows what the court regarded

as the machinery of a court of justice. In conclusion the court said:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Over and over again the court referred to the absence of an investigation by judicial machinery, thus showing that the court could not have regarded a hearing by a court as essential, as it would have been easy to have said so if that had been the meaning. The ninth paragraph of Mr. Justice Miller's concurring opinion shows what he regarded as one of the grounds upon which the majority opinion was based. Mr. Justice Miller there said:

> "I do not agree that it was necessary to the validity of the action of the Commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the Legislature to have given such notice if it had established such rates by legislative enactment."

That the Kentucky Railroad Commission has the machinery of a court of justice, or "judicial machinery," can not be seriously questioned. Section 827 of Kentucky Statutes provides that the Commission shall have power "to issue subpoenas for the attendance of witnesses, and to administer oaths" and penalties are provided for the refusal of witnesses to obey subpoenas issued by the Commission or to testify. By the McChord Act, Section 820A of the Kentucky Statutes, the Commission is required to give ten days notice of the filing of complaints, and to hear such "statements, arguments or evidence offered by the parties as the Commission may deem relevant." Of course, if the Commission should arbitrarily refuse to hear material evidence offered by the carrier any order it might make fixing a rate would be declared void by the courts.

This court, however, is the best judge of the meaning and effect of its own decisions, and the interpretation which the court in San Diego Land & Town Co. v. National City, 174 U. S. 739, placed upon its opinion in Chicago, etc., Railway Co. v. Minnesota, *supra*, as shown on page 18 of our original brief, is conclusive. Counsel have persistently ignored that interpretation, and it is unnecessary to notice it further here. In San Diego Land & Town Co. v. National City the court did not think it necessary that the tribunal which fixed the rates should even have the *machinery* of a court of justice, the rates there involved being fixed by a municipal board. Nor did the court think it necessary that there should be a provision in the statute for a review of the rates by

any court. The right to go into a court of equity under the general principles of equity jurisprudence for the protection of constitutional rights was all that was regarded as necessary. The trouble in Chicago, etc., R. Co. v. Minnesota, *supra,* was that that right was cut off by the Supreme Court of Minnesota, which refused to permit the carrier to show that the rates prescribed were so low as to take its property without due process of law.

Counsel for appellant say, on page 73 of their original brief, that the Kentucky Railroad Tax cases 115 U. S. 321 cited by the lower court are not in point in a rate case as to what constitutes due process of law because those were tax cases, but this court seems to have thought otherwise in San Diego Land & Town Co. v. National City, 174 U. S. 739.

In Ex Parte Young, 209 U. S. 123, the court at page 127 cited Chicago, etc., R. Co. v. Minnesota as holding that if a law be such as to make the decision of the legislature or of a Commission conclusive "as to the sufficiency of the rates" the law is unconstitutional, and the court then held that the penalties prescribed by the law there involved were so excessive as to preclude an inquiry by the courts as to whether or not the rates were confiscatory, and that for that reason the provisions for penalties were void. The court then proceeded to hold that the circuit court had jurisdiction to inquire whether or not the rates were confiscatory, which makes it clear that the court by the phrase "as to the sufficiency of the rates" meant the sufficiency of the rates to yield a fair return to the carrier on his investment. If the

omission of the statute to provide for a review had been sufficient to invalidate the statute that would have ended the case, and the circuit court would have had no occasion to inquire as to whether or not the rates were confiscatory.

On page 88 of their original brief counsel for appellant say that the case of Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418, "was not a case of *confiscation* at all." Let us see whether or not that is an accurate statement. That was a writ of error to review a judgment of the Supreme Court of the State of Minnesota awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railway Company, requiring it to comply with and order of the Railroad and Warehouse Commission of that State by withdrawing its rates and charges on milk and substituting therefor certain rates prescribed by the Commission. The court in its statement of the case said:

> "On the 23d of December,1887, the company filed its return to the alternative writ, in which it set up:
>
> (1) That it was not competent for the Legislature of Minnesota to delegate to a Commission the power of fixing rates for transportation, and that the Act of March 7, 1887, so far as it attempted to confer upon the Commission power to establish rates for the transportation of freight and passengers, was void under the Constitution of the State;
>
> (2) That the company, as the owner of its railroad, franchises, equipment and appurtenances, and entitled to the possession and beneficial use thereof, was authorized to establish rates for the transportation of freight and passengers, subject only to the

provision that such rates should be fair and reasonable; that the establishing of such rates by the State against the will of the company was *pro tanto* a taking of its property, and depriving it thereof, without due process of law, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States; and that the making of the order of October 13, 1887, was *pro tanto* a taking, and depriving the company, of its property without due process of law, in violation of said Section 1, and therefore void and of no effect;

(3) That the rate of 3 cents per gallon as a freight for carrying milk in ten-gallon cans on passenger trains from Owatonna and Fairbault respectively to St. Paul and Minneapolis was a reasonable, fair and just rate; that the rate of 2½ cents per gallon, in ten-gallon cans, so fixed and established by the Commission, was not a reasonable, fair or just compensation to the company for the service rendered; and that the establishing of such rate by the Commission, against the will of the company, was *pro tanto* a taking of its property without due process of law, in violation of said Section 1."

The court refused to permit the carrier to introduce any testimony whatever in support of its return to the writ and directed a peremptory mandamus to issue requiring the carrier to comply with the requirements of the Commission.

By its return the carrier certainly did seek to avoid the enforcement of the order of the Commission upon the ground that the rates were so low as to deprive it of its property without due process of law, and whatever may be the test applied for the purpose of determining whether or not rates are so low as to amount to the taking of property without due process of law it is

certain that when rates are that low they are confiscatory. The Supreme Court of Minnesota refused to permit the carrier to be heard upon that question, and required the carrier's rates to be changed to conform to the order of the Commission. The State courts were thus forever closed to the carrier without a hearing at any time. The ground upon which the State court refused to give the carrier a hearing as to whether or not the rates were confiscatory was not that the facts stated in the return were not sufficient to show that the rates were confiscatory, but that the statute did not contemplate that there should be a hearing as to that matter. But this court in the case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, quoted from on page 20 of our original brief, held that it will be presumed that the State courts are open for the inquiry as to whether or not the rates are so low as to violate constitutional rights until the contrary appears, strongly intimating that rates fixed even without notice or hearing might be valid if not arbitrarily fixed. And as Mr. Justice Miller said in his concurring opinion in Chicago, etc., R. Co. v. Minnesota, *supra*, there seems to be no more reason for notice and hearing where a Commission prescribes rates pursuant to legislative authority than there is for notice and hearing where a legislature prescribes rates.

In the case at bar, however, it is conceded that the carrier had the fullest opportunity to be heard under a statute according that right, and was heard.

II.

The allegation that there was no evidence before the Commission tending to show what "was or might be a just or reasonable rate" does not show that the Commission exceeded its power in prescribing rates.

The allegation that there was no evidence before the Commission tending to show what might be a just or reasonable rate is found in Paragraph XI of the bill, and the connection in which it is made is significant. After stating that the only subject matter that was brought before the Commission for investigation was the making and fixing of rates on the commodities in question when used for distilling purposes, the complainant says:

> "This complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and in-

vestigation aforementioned, and its said orders thereon were and are null and void." (Tr., p. 20.)

It will be noted that the complaint is that under the complaint and evidence the only question before the Commission was as to the reasonableness of rates on the commodities in question when used for distilling purposes, and that the Commission for that reason exceeded its power when it went further and fixed rates on the commodities when used for other purposes, and all the allegations made in that connection must be regarded as intended to raise only that question. The complaint filed before the Commission, however, shows that complaint was made of the rates without regard to the purposes for which the commodities were used (Tr., p. 33), and so the claim that the Commission had no jurisdiction to pass upon any question except the reasonableness of the rates for distilling purposes falls to the ground.

Taking the allegation that there was no evidence tending to show what might be a just or reasonable rate out of its setting, and treating it as intended to charge that the want of evidence tending to show what might be a just or reasonable rate was sufficient to deprive the Commission of jurisdiction for any purpose, then it seems clear that the allegation states only a conclusion of law. In arriving at the meaning of the pleader we must consider this allegation in connection with the allegation in Paragraph XI of the bill (Tr., p. 19) to the effect that there was no evidence tending to show that the rates were "in and of themselves" unjust, unreasonable or extortionate. This language in connection with the state-

ment that the evidence bore no "proper relation" to the reasonableness of rates on the commodities in question when used for distilling purposes, suggests very strongly that the pleader was trying to satisfy his conscience by evasive allegations, and the court is authorized to conclude that the pleader meant that comparisons of the rates in question with the rates on other lines, or with the rates which the carrier had previously maintained, did not tend to show that the existing rates were "in and of themselves" unreasonable. But accepting the allegation as a statement of fact, and as meaning that the evidence did not tend to show what might be a just or reasonable rate on the commodities in question when used for any purpose, it does not show that the Commission exceeded its power. Regardless of any mistakes made by the Commission in the inferences which it drew from the evidence, the law presumes that the rates which it has fixed are reasonable and the burden is upon the carrier to show that they are unreasonable.

Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257.

Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co., 212 U. S. 414.

If no evidence was heard which tended to show what might be a just or reasonable rate, it was the fault of the carrier. The carrier says, in effect, that even though the rates prescribed are altogether reasonable, and the Commission may have had knowledge of facts which showed that they would be reasonable, the rates can not be en-

forced if the evidence heard by the Commission did not tend to show what would be a reasonable rate.

The statute does not attempt to fix the burden of proof, and the Commission may adopt any rules it pleases as to that matter, provided it gives the carrier full opportunity to be heard.

No provision of the Constitution has been pointed out which requires that the Commission should base its finding upon evidence heard, and in view of the fact that the statute authorizes the Commission to initiate the proceeding, it certainly can not be contended that the Commission is required to do more than to give the railroad company an opportunity to introduce all the evidence it desires to introduce.

Accepting as facts all the legal conclusions of the bill, the most that can be claimed for the appellant is that the Railroad Commission placed upon the carrier the burden of showing that the rates it had for many years maintained on grain and other commodities used in the manufacture of whiskey and its preparation for market would not be reasonable rates on the same commodities when used for other purposes. We have the right to assume that the carrier refused to introduce any evidence whatever which would throw any light upon those matters, and that being true it can not complain that the evidence heard by the Commission did not tend to show what would be a just and reasonable rate.

Under the Act to Regulate Commerce as amended June 18, 1910, the burden is upon a carrier to justify an increase in his interstate rates, and it has never been

suggested that Congress did not have the power to impose this burden. While the McChord Act does not give the Railroad Commission the power to suspend an increase of rates, yet if the Commission has prescribed reasonable rates its order certainly can not be declared void because the Commission may have found those rates to be reasonable upon the ground that the carrier had for many years given the same rates to the largest shippers of the commodities to which the rates apply, and had shown no reason for giving them lower rates than other shippers. The courts can not declare an order of the Commission to be void merely because the Commission may have supposed that the evidence heard tended to show the rate which it prescribed to be reasonable when in fact the evidence did not tend to show what might be a reasonable rate. A judgment of a court is not void even though there be no evidence whatever to support it, and for a much stronger reason an order of a Railroad Commission as to rates can not be declared void because the Commission may have erred in supposing that the evidence which it heard was relevant to the question which it was considering. Section 781 of the Kentucky Statutes requires all the railroad companies operating in the State to file their tariffs with the Commission, and the Commission had the right to consider those tariffs for purposes of comparison, although not introduced in evidence. There was little other evidence, if any, that could have been considered that would have tended to show what would be a just or reasonable rate except evidence as to the cost of the service, and as the carrier

alone could furnish that evidence, the failure to produce it must be charged to the carrier.

While we insist that even under the rules which this court has laid down for testing the validity of orders of the Interstate Commerce Commission the rate order of the Kentucky Railroad Commission here complained of must be upheld, the power which the courts have to review the rate orders of the Interstate Commerce Commission is not the test of their power to review the rate orders of the Kentucky Railroad Commission. By the Act to Regulate Commerce the power is expressly given to the courts to review the rate orders of the Interstate Commerce Commission, and it is merely a question as to what weight the courts will give the conclusions of that tribunal in the absence of any provision in the statute as to that matter.

In the case of Interstate Commerce Commission v. Union Pacific Railway Company decided January 9, 1912, Mr. Justice Lamar, referring to the Interstate Commerce Commission, said:

> "Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The McChord Act contains no provision for review by the courts, and, therefore, the *conclusion* of the Railroad Commission is not subject to review. If the Com-

mission kept within its statutory power, the only question is whether or not its order violates some constitutional right of the carrier. In one breath counsel for appellant ask the court to hold the statute to be void because it provides for no review by the courts, and in the next they ask the court to set aside the order because of an erroneous conclusion of the Commission as to what the evidence tended to show. If the statute provides, in effect, that there shall be no review by the courts of the conclusion of the Commission, as counsel for appellant claim, as well as concede, that it does, and the statute is valid notwithstanding that fact, then it is not clear how the courts can inquire as to the correctness of the conclusion of the Commission as to whether or not the evidence tended to show what was a just and reasonable rate.

Even if the bare allegation that there was no evidence before the Commission tending to show what might be a just or reasonable rate would be good on demurrer, the allegation must be supported by some evidence to authorize an injunction, as it was merely a statement of the opinion of the officer of the defendant who verified the bill. There is nothing in the bill to authorize the inference that the three Railroad Commissioners did not in good faith believe that the evidence tended to show that the rates prescribed were reasonable, and that the existing rates of the carrier were unreasonable, and we affirmatively show that they did in good faith so believe, and yet the court is asked to grant an injunction because one of the defendant's officers disagrees

with those public officials as to the effect of the evidence. The affidavits filed in support of the bill make no reference to the evidence which was heard, while the affidavits for defendant (Tr., pp. 65-71) show that many witnesses were examined, and that the Commission carefully considered the evidence and believed that it did show the existing rates to be unreasonable and the rates prescribed to be reasonable. While the affiants did not attempt to state the substance or effect of all the evidence it does appear from their affidavits that the evidence showed that for many years the defendant under similar conditions maintained the rates which the Railroad Commission has prescribed, the only difference being that during those years those rates were given to distillers alone, but it also appears from the affidavits that the evidence showed that at some of the points involved the distillers were the only persons receiving the commodities to which the rates apply, and that at none of the points involved were the shipments to others than distillers sufficient to affect the carrier's revenue to any appreciable extent. So far as appears the carrier did not attempt to give any excuse whatever for the increase of rates, or to show that any other rates would be affected. The rates on a particular commodity which a carrier has for many years given to the principal shippers of that commodity, when no change of condition is shown, certainly do tend to show to some extent what would be a reasonable rate on that commodity for the future.

While this court said in Interstate Commerce Commission v. Chicago G. W. R. Co., 209 U. S. 108, 119, that "the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done" the court also said: "Undoubtedly when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor." But all that we are contending for here is that the fact that the carrier has for many years given certain rates to the principal shippers of a commodity tends to show to some extent what would be a just and reasonable rate to all shippers of that commodity, no change of conditions being shown.

In Alabama & Vicksburg Railway Co. v. Mississippi Railroad Commission, 203 U. S. 496, the court by Mr. Justice Brewer said:

> "While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a State Railroad Commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the Commission is justified in making that rate the rate for all."

We insist, however, that the court can not assume that the evidence as to the old rate was the only evidence heard by the Commission.

The case of Railroad Commission v. Cumberland Telephone & Telegraph Company, 212 U. S. 414, is an instructive one. In that case the complainant, Cumberland Telephone & Telegraph Company, went into the

Circuit Court of the United States for the Eastern District of Louisiana seeking to enjoin the enforcement of certain rates prescribed by the Railroad Commission of that State for use by the telephone company therein. Article 284 of the Constitution of Louisiana authorized the Railroad Commission to adopt just and reasonable rates for telephone companies operating within that State, and Article 285 provided that if any corporation subject to the Commission should be dissatisfied with its decision fixing or adopting any rate, the corporation thus dissatisfied might file a petition setting forth the cause of its objection in any court of competent jurisdiction. The telephone company sought to enjoin the enforcement of the rates both upon the ground that they were in violation of the fourteenth amendment of the Constitution of the United States, and of the Constitution of the State of Louisiana. It appeared that the Commission after examining the returns of the telephone company made to the Commission issued an order to show cause why its rates should not be decreased, and on the final hearing on the return of the order to show cause took into consideration both the statement presented by the complainant on the return of that order, and also the statements or returns previously filed by the company. It was argued that as the rates were fixed by merely arbitrary conjecture by the Commission and not based on investigation or the exercise of judgment and discretion, there was no presumption of the correctness of the rates. In answer to that argument the court, by Mr. Justice Peckham, said:

"Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon the investigation, the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns; but that is far from showing that the Commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, can not be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated, must be regarded as *prima facie* fair and valid, or, in other words, the onus was upon the complainant to show that they were what it asserts, confiscatory or unreasonable."

In that case the court was reviewing the order of the Commission under an express provision of the Constitution of Louisiana giving a right of review, and yet the court said that it mattered not what mistakes the Commission may have made in its inferences from the evidence there was still a presumption that the rates prescribed were reasonable.

It was the duty of the carrier to preserve the evidence heard by the Railroad Commission if it desired to question the correctness of the conclusions or inferences

which the Commission might draw from the evidence. It is quite as important for the court to have before it the evidence heard by the Commission in order to determine whether or not there was any testimony which tended to support the conclusions of the Commission as it would be for the court to have that evidence before it in order to determine the weight of the evidence. If the evidence was preserved the official report of that evidence is the best evidence, and nothing else can be received upon the hearing of the motion for a preliminary injunction, unless the absence of that report is accounted for. If the evidence was not preserved the court must assume that there was some evidence to support the conclusions of the Commission. There is no reason why the complainant should not at least state the substance of the evidence.

In Shoemaker v. National Mechanics Bank, 31 Md. 396, the court held that an injunction was properly refused where the complainant failed to produce copies of pleadings or exhibits in support of averments as to the objects and purposes of suits the prosecution of which was sought to be enjoined.

In the absence of a stenographic report of the evidence, if the preliminary injunction should be granted upon the ground that there was no evidence tending to show what might be a reasonable rate, the court would have to depend upon the memory of witnesses in determining what the evidence tended to show. Surely, the validity of the order of the Commission can not depend upon anything so uncertain. In the cases in which this

court passes upon the validity of orders of the Interstate Commerce Commission it has before it the evidence heard by the Commission and not merely the memory of witnesses as to that evidence.

III.

The bill does not allege that the rates prescribed by the Commission are not compensatory.

On pages 38-40 of their reply brief counsel for appellant complain that the statement in our original brief that no facts are alleged in the bill to show that the action of the Commission was unreasonable, or that the rates prescribed are unreasonably low, is not in accordance with the facts, and in support of that complaint refer to the allegation in Paragraph XX. of the first amended bill to the effect that the rates prescribed are unreasonable because of the "fact" that if the order of the Commission is enforced the carrier will be compelled to accept upon interstate as well as intrastate traffic, rates which are unreasonably low and not compensatory. The pleader was most careful in that connection not to state that the rates prescribed are unreasonably low, the allegation being that those rates are *unreasonable* because of the "fact" that if they are put into effect the carrier will be compelled to accept other rates which are not compensatory. The pleader had alleged that the enforcement of the rates prescribed would require a readjustment of both interstate and intrastate rates, and the allegation is that because of that "fact"

the carrier will be compelled to accept rates which will not be fair compensation. The statement that the rates prescribed are unreasonable for that reason excludes the idea that the rates prescribed when considered alone are unreasonably low. If the court may consider the fact that the carrier, as a matter of business policy, may, as a result of the Commission's order, have to reduce other rates, and that its rates considered as a whole will then be not compensatory, of course the fixing of a single rate by the Commission would involve the whole body of rates of the carrier, and there could be no such thing as a regulation of anything less than the whole body of rates. Even if the effect upon other rates were sufficient to show that the rates prescribed are confiscatory, the ultimate fact that the rates prescribed are so low as to take the carriers property without due process of law, would have to be alleged, an allegation of evidential facts alone not being sufficient.

The appellant very earnestly insisted in L. & N. R. Co. v. Siler, 213 U. S. 175, that the Legislature did not intend by the McChord Act to confer the power upon the Commission to prescribe schedules of rates, and that this could not have been intended because the Commission could not fairly perform such a task, but the argument here made that the Commission in fixing a single rate must consider the whole body of rates is, in effect, an argument that justice can not be done except by the making of a schedule of rates.

In determining whether or not a certain rate would be a reasonable rate for the future it is, of course, proper

for the Commission to consider the relation of that rate to other rates, but the court, in determining whether or not the rate prescribed by the Commission is confiscatory, must assume all rates not attacked to be reasonable. In no other way would it be possible to uphold a statute authorizing a Commission to prescribe one rate at a time. The circumstances and conditions under which shipments are made between any two points are never exactly the same as the circumstances and conditions under which shipments are made between other points, and, therefore, it can never be said with certainty that the Commission would have to require other rates to be changed to conform to the rate in question. It must be remembered that the courts have no power to pass upon what would be a reasonable rate for the future until that question has been passed upon by the Commission, and then only for the purpose of determining whether or not the rate prescribed is so low as to take property without due process of law. Therefore, the court can not determine what would be a reasonable rate between other points for the future, or whether or not the Commission would have to change other rates. It may be safely assumed that appellant will not reduce other rates until it is compelled to do so. The allegation that the carrier will be compelled to do certain things if the order of the Commission is enforced is not a statement of an existing fact, and is, therefore, not admitted by the demurrer.

Southern Railway Company v. King, 217 U. S. 524.

Counsel seem to suppose that the allegation in Paragraph XIII of their bill (Reply Brief, p. 39) to the effect that the existing rates of the carrier are not unreasonably high is equivalent to an allegation that the rates prescribed by the Commission are unreasonably low, but we submit that there must be a field of reasonableness affording room for the play of judgment as to what is a reasonable rate, and that it does not follow that because a certain rate is not unreasonably high any lower rate is unreasonably low. Paragraph XIII is based upon the theory that the Fourteenth Amendment guarantees to a common carrier the right to fix his own rates, and that other rates can not be prescribed unless those rates are extortionate. That this is not the law is attested by the many cases in which the power of Legislatures and of Railroad Commissions to prescribe schedules of rates have been upheld.

Not only are no *facts* alleged in the bill to show that the rates prescribed are so low as to deprive the carrier of its property without due process of law, but it is manifest that the pleader did not intend to place the complainant's case upon that ground, and that such general allegations as the bill contains as to the unreasonableness of the rates were made by way of inducement, and to show merely the supposed hardship of the enforcement of the statute, or to show that complainant was entitled to question the validity of the statute.

The argument that the court can not apply the same test in determining whether or not a single rate is confiscatory that it applies in determining whether or not

a body of rates is confiscatory is not relevant here, as there must, in any event, be an allegation that the rate or rates in question are so low as to deprive the carrier of his property without due process of law before the court can interfere upon that ground, and such an allegation is wanting here. But even if such an allegation were made it would not be sufficient without the further allegation of some fact from which the court might conclude that the rate would deprive the carrier of his property without due process of law.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 401.

IV.

Affidavits do not show that rates prescribed are not compensatory.

The affidavit of C. B. Compton, appellant's Traffic Manager (Tr. p. 45), and of D. M. Goodwyn, appellant's General Freight Agent (Tr. p. 59), are devoted largely to a statement of the changes in other rates which will become necessary if the order of the Commission is enforced, but neither of the affiants states any fact tending to show that after all such changes are made the rates as a whole will not yield the carrier a handsome return. It is true that the affiants state that the carrier will be compelled to accept rates which will not yield the carrier a "fair and reasonable" return, but the court will hardly accept the opinions of the traffic officials of a railroad company as to what is a fair and reasonable return to

the company for the service performed. Presumably, the rates are originally fixed by the traffic officials at what they think will yield the carrier a fair and reasonable compensation for the service rendered, and if their judgment as to that matter is to be accepted it is useless to have a Commission to regulate rates. But the charge which the carrier will be compelled to make in other rates is purely speculative, and there is no claim by either of the affiiants that the rates prescribed by the order complained of would not yield the carrier a very large profit.

There is no allegation in the bill or statement in the supporting affidavits which shows that the rates prescribed by the Commission between the points named in its order are relatively lower than rates between other points. The statement that the rates are lower than the rates between other points means nothing in view of the fact that the rates prescribed by the order of the Commission are for different distances, and vary in amount, and the distances to points compared are not given. The most that appears is that the rates prescribed vary from appellant's so-called standard rates, and the claim is that the appellant will, therefore, be compelled to vary from its standard rates between other points, but the court is not enlightened as to the basis upon which appellant's "standard rates" are established. One might suppose from their designation that they were fixed upon a mileage basis or according to some fixed standard, but a very slight examination will show that such is not the case. The table embodied in D. M. Goodwyn's affidavit (Tr., p. 62) shows in the

column of "Standard rates" a rate of 12 cents on grain for a distance of 129 miles and the same rate for 67 miles, while it shows in the same column a rate of 15 cents for a distance of 73 miles. These rates show that distance is not a factor in the making of appellant's so-called standard rates, and there is nowhere in the record a statement that these rates rest upon any fixed basis, or anything to show that a departure from them would not tend to bring about equality. As to the claim that the order disregards the long and short haul law, there is nothing to show that the commodities to which the rates in question apply move at all to any of the shorter distance points named in the affidavits, or that those points furnish any traffic whatever to the appellant. Besides, as suggested in our original brief the presumption is that if the rates prescribed are reasonable, higher rates for shorter distances within the longer distances to which the rates prescribed apply are unreasonable.

Affiants compare the rates prescribed by the order of the Commission of August 10, 1910, with the rates prescribed by a general order made in June, 1906, which this court held in L. & N. R. Co. v. Siler, et al, 213 U. S. 175, to be beyond the power of the Commission, but that order, which is the best evidence of the rates prescribed therein, is not before the court, and the affiants fail to refer to the fact that the order provided that the rates then in existence should not be exceeded. The rates prescribed by the order of August 10, 1910, are the same rates which were in force at the time of the order of June, 1906, ex-

cept that at that time the rates only applied to distillers, while they now apply to all shippers, and therefore those rates as applied to distillers could not be increased under the order of June, 1906.

A table embodied in Mr. Goodwyn's affidavit (Tr., p. 62) shows that the average revenue per ton per mile which the rates on grain prescribed by the Commissioner's order will yield is a fraction over two cents, and that the lowest revenue per ton per mile which any of the rates on grain fixed by the order will yield is about 15 mills. The Interstate Commerce Commission has repeatedly said that grain is a very low-grade freight. In the matter of proposed advances in freight rates, 9 I. C. C. R. 382, Mr. Commissioner Prouty, said (page 396):

> "Now of all commodities, grain is among the very most desirable species of traffic."

And again (page 398):

> "Grain is a commodity which upon all accounts is entitled to one of the lowest rates accorded to any article."

In the Matter of the Investigation of Advances in Grain Rates 21 I. C. C. Rep. 22 (33), the Interstate Commerce Commission said:

> "Defendants contend that distance is only one of the factors considered in making the rates, and say that commercial conditions, competition, free movement and volume of traffic, and other factors were also considered. But in the view of the Commission, on no traffic, except it be lumber, are per-

ton-per-mile earnings more helpful than on grain. The present average rate per ton per mile on wheat in South Dakota is 8.38 mills. The average for the four States of Iowa, Minnesota, North and South Dakota is 8.48 mills."

The statistics of the railroads of the country for 1909, published by the Interstate Commerce Commission from reports made by the companies to that body, show that the average revenue per ton per mile on the entire system of the Louisville & Nashville Railroad Company is 7.6 mills. (Statistics of Railways in the United States for 1909, page 808). Of course, the hauls we have here are short as compared with the average haul on the entire system, but when rates for an average haul of 64 miles upon a commodity of very low grade yield an average revenue per ton per mile almost three times as great as the average on all commodities, the court will be slow to conclude that the rates are in any sense confiscatory, although the average haul may be considerably shorter than the average haul on the entire system. In the case of Mayor, etc., of Wichita v. A. T. & S. F. Railway Company, *et al*, 9, I. C. C. Rep. 558, the Interstate Commerce Commission commented on the fact that the rate on coal attacked in that case yielded a revenue per ton per mile which almost equaled the average revenue per ton per mile upon the entire system, which the Commission seemed to think was conclusive evidence that the rate was too high in view of the fact that coal was a low grade freight.

The affiants state in general terms that the rates prescribed by the Commission are lower than the rates in effect in several other States, but they make no reference to the comparison of rates made by the evidence heard by the Commission. But it matters not what the affidavits show when there is no allegation in the bill of any fact which tends to show that the rates prescribed are not fully compensatory.

V.

The McChord Act does not confer judicial power on the Railroad Commission in violation of either Section 28 or Section 109 of the Kentucky Constitution.

Sections 27 and 28 of the Kentucky Constitution read as follows:

"Section 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive to another; and those which are judicial to another.

"Section 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Section 109 of the same instrument reads as follows:

"The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the

Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

The statement of counsel for appellant on page 68 of their reply brief that "to sustain the finality of the rate-making orders of the Kentucky Railroad Commission" we are driven to the contention that the Commission is vested with judicial powers misrepresents our argument. In all that we said as to the judicial power of the Railroad Commission we were answering the objection of counsel for appellant that the McChord Act confers judicial power upon the Commission, and that part of our argument clearly shows that we were not then attempting to sustain the finality of the action of the Commission. We argued that the power conferred upon the Commission to determine whether or not the existing rates of a carrier are extortionate is not a judicial power, being merely the basis of legislative action, but that even if it could be so considered the Legislature was authorized to confer that power in view of the power of the same general nature conferred by Section 218 of the Constitution, and of the fact that the Commission had exercised judicial power under the former Constitution. The fixing of a rate is either administrative or legislative, and it is not necessary to make it appear that the Commission has judicial power in order to sustain the finality of the action of the Commission. The action of the Commission is final only in the sense that any other legislative action is final, the courts being always open for the purpose of applying the test of

the Constitution. It is true that the court in Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 418, did hold that where the carrier was excluded from the courts even for the purpose of showing that his property had been taken without due process of law, rates prescribed by the Commission could not be upheld unless the Commission had the machinery of a court of justice, and the statute provided for a hearing before that body; but even in that state of case it is not necessary that the Commission should have "judicial power" in the broad sense in which that phrase is used in Section 109 of the Kentucky Constitution.

Much stress is laid upon the following language of Mr. Justice Brewer in Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U. S. 479, 499:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

In a later part of his opinion, however, Mr. Justice Brewer said (p. 509):

> "It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country."

It is inconceivable that any inquiry and examination an administrative body might make for the purpose of

determining the reasonableness of a rate for the future would not include an inquiry as to the reasonableness of existing rates, and so it is clear that when Mr. Justice Brewer said that the inquiry whether the rates which have been charged and collected are reasonable is a judicial act he meant an inquiry made for the purpose of making, and followed by, an order restoring the excess in the event the rate should be found to be unreasonable. The mere inquiry itself would be only administrative.

Counsel question our statement that under a statute in force prior to the adoption of the present Kentucky Constitution (Gen. Stats. ed. 1888, p. 1028) the Railroad Commission had judicial power, but they fail to refer to the fact that the Commission by that statute was given the power to render a money judgment upon which execution might issue upon the mere filing of the judgment in the Clerk's office of the Circuit Court. Section 19 of the Act of April 6, 1882, originally creating the Railroad Commission read as follows:

> "Said commissioners shall hear and determine complaints under the first and second sections of this act. Such complaints shall be made to said commissioners in writing, and they shall give the company complained of not less than ten days' notice of the time and place of hearing the same. They shall hear the evidence of the parties, and award judgment as authorized by this act. Unless the same be satisfied, the chairman shall, within ten days, file a copy of said award in the office of the clerk of the circuit court of the county which, under the Code of Practice, would have jurisdiction of

such controversy, on which execution shall issue as on other judgments: Provided, that any party dissatisfied with said award may, within ten days, file a traverse thereof with the clerk of said court, who shall docket the same for trial at the next term. If the matter in controversy shall exceed twenty dollars, said court, on demand of either party, shall empanel a jury to try the same. If it does not exceed that sum, the court shall hear and summarily decide the same without the intervention of a jury."

The provision of that statute authorizing execution on the judgment of the Commission remained in force for about eight years, and provision was then made for filing the award in the clerk's office of the circuit court and issuing summons thereon, the award to be *prima facie* evidence of its correctness upon the trial in the circuit court. (Acts 1889-90, Vol. 1, p. 25.) That statute was in force when the Constitution was adopted.

If the original Act did not confer judicial power we are unable to understand what would constitute such power. The fact that the carrier might have the judgment reviewed did not take away its judicial character. Even the later statute which was in force when the Constitution was adopted gave power to perform a judicial act, according to the contention of counsel for appellant, who insist that every inquiry as to whether or not a reasonable rate has been charged in the past is judicial in its nature.

But counsel for appellant say that the finding under that statute was not final, while the finding under the McChord Act that the carrier is charging an extortionate rate is final, and for that reason judicial. To that

objection the case of Field v. Clark, 143 U. S. 649, upon which counsel for appellant rely, seems to be a conclusive answer. In that case the court held that an Act of Congress which gave to the President the power to suspend the provisions of the Tariff Act relating to the future introduction into this country of the products of another country when he found that such country was imposing unreasonable duties upon the introduction into that country of the products of the United States, did not delegate legislative power, and that the President exercised only an executive duty in determining whether or not the duties imposed by another country upon the products of the United States were unreasonable, as he was "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

By the McChord Act the Railroad Commission is made the agent of the law-making department to ascertain whether or not the carrier is charging an extortionate rate, and it is only in the event of such a finding that the law is to take effect. An inquiry as to whether or not existing tariff duties are unreasonable does not differ in its character in the slightest degree from an inquiry as to whether or not the rates of a carrier are unreasonable.

While that part of our original argument to which counsel for appellant refer on page 68 of their reply brief was not made for the purpose of sustaining the finality of the action of the Commission, because we did not regard it as at all necessary to establish the proposi-

tion that the Commission has judicial power in order to give validity to legislative action, yet if that were necessary we think there can be no doubt that the provision of Section 209 of the Kentucky Constitution that the duties and powers of the Railroad Commission created by that section shall be "regulated by law" gave power to the Legislature to confer upon the Railroad Commission such judicial power as might be necessary to finally determine the reasonableness of rates, subject only to the power of the courts to protect the carrier against the taking of his property without due process of law.

In Gibbs v. Board of Aldermen of City of Louisville, 99 Ky. 490, the court held that a statute conferring power upon the Board of Aldermen "sitting as a court" to remove executive and ministerial officers was not in violation of Section 109 of the Constitution.

The court said:

> "Section 160 of the present Constitution left with the Legislature the right of determining the manner in and the cause for which city officials may be removed; and, while the board of aldermen may be termed, in one sense, a court, it is an organized municipal body, with the power to remove city officials, and is not a court of impeachment, nor was it ever contemplated by the framers of the Constitution that city officers could be removed by impeachment proceedings before the State senate."

All this discussion, however, as to judicial power seems to be unnecessary in view of the fact that the Legislature would have the right to accept as reasonable any rates which the Railroad Commission might find to

be reasonable, and to declare those rates to be the only lawful rates, without requiring the Commission to first find existing rates to be unreasonable. That being true, it is difficult to understand how the carrier can complain of that requirement.

The Federal Courts are always slow to declare a State statute to be in violation of the State Constitution when the State courts have never passed upon the validity of the statute. In Michigan Central R. Co. v. Powers, 201 U. S. 245, the court, by Mr. Justice Brewer, said:

> "Undoubtedly a Federal Court has the jurisdiction, and, when the question is properly presented, it may often become its duty, to pass upon an alleged conflict between a statute and the State Constitution, even before the question has been considered by the State tribunals. All objections to the validity of the act, whether springing out of the State or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination. At the same time the Federal courts will be reluctant to adjudge a State statute to be in conflict with the State Constitution before that question has been considered by the State tribunals."

It is significant that the validity of the McChord Act has never yet been passed upon by the Court of Appeals of Kentucky although more than twelve years have passed since it was enacted. It is safe to assume that during that time many orders reducing rates have been made by the Railroad Commission, and that the railroads have carefully refrained from testing the validity

of the statute in the State courts for the reason that they know that such a test would result in a decision upholding the statute.

VI.

The Willamette Valley Case (Southern Pacific Co. v. Interstate Commerce Commission), 219 U. S. 43, has no application because there is no allegation in the bill that the Railroad Commission prescribed the rates complained of upon any other ground than that the carrier's rates were unreasonable, and that the rates prescribed were reasonable rates for the service to be performed.

There is not even a suggestion in the bill that the Railroad Commission did not in good faith believe that the existing rates of the carrier were extortionate, or that the rates prescribed were reasonable, and that being true there is not the slightest ground for the argument that the rates prescribed by the Railroad Commission were prescribed by that tribunal because of some equitable consideration. This court based its decision in the Willamette Valley case upon the ground that the reasons given by the Interstate Commerce Commission for its order showed that it did not find that the rates which it prescribed were reasonable rates. In the case at bar the Railroad Commission distinctly found that the existing rates were extortionate, and that the rates prescribed were reasonable, and those findings can not be impeached upon a mere suspicion as to what may have influenced the Commission.

VII.

The Federal Court had no jurisdiction to consider the reasonableness of the rates except for the purpose of determining whether or not they deprived the carrier of its property without due process of law.

The carrier went into the Federal Court upon the ground that the McChord Act gave finality to the action of the Railroad Commission, and thus deprived it of its property without due process of law. That being true, it would seem that it can not have relief upon the ground that the action of the Commission was not final. While the Federal Court when it has acquired jurisdiction ordinarily gives full relief, yet the complainant ought not to have relief upon a ground altogether inconsistent with one of the grounds upon which it invoked the jurisdiction of the court.

On page 94 of their original brief counsel for appellant concede that in Louisana R. R. Commission v. Cumberland Telegraph & Telephone Co., 212 U. S. 414 (420) this court considered the question as to whether or not the rates were unreasonably low as distinguished from the question as to whether or not they were confiscatory, only because the State law provided for such a review, and because there was diversity of citizenship, which gave the court jurisdiction of the question as to whether or not the State law was violated. In the case at bar there is no diversity of citizenship, and no State statute providing for a review, and so it would seem that the court can consider only the question as to whether

or not the rates are confiscatory. It is quite certain that if the court does consider the question as to whether or not the Commission made some mistake in its inferences from the evidence it must do so solely upon the ground that the State law authorizes such a review, as we must, for the purpose of this part of the argument, assume the statute to be valid. Besides, as already suggested in another part of our argument it seems that the general allegations of the bill as to the unreasonableness of the rates were not intended for any other purpose than to show complainant's right to attack the statute.

Indeed, it does not seem that counsel for appellant are insisting that the court has power to grant an injunction upon the ground that the rates prescribed are unreasonably low unless they are so low as to amount to the taking of property without due process of law, and there is no assignment of error which would authorize such a contention. We do not speak with assurance as to the contention of counsel for appellant because it is not clear whether or not they are insisting that the court may review the action of the Commission just as if the statute provided for a review.

VIII.

The failure of the Railroad Company to prove before the Commission the effect on other rates which the changes asked for in existing rates would have is a bar to an injunction on the ground that the effect would be to reduce other rates.

The ground upon which the carrier complains that the rates prescribed, if enforced, will deprive it of its property without due process of law is that it will be compelled, if those rates are enforced, to change other rates, and that its rates when thus changed will not be compensatory. So far as appears no such claim was made before the Railroad Commission, and no facts presented to that tribunal even tending to show that the changes in the rates complained of which the Commission was asked to make would have the effect upon other rates now claimed for them. The facts as to the effect upon other rates which the changes in existing rates which were asked for would have were peculiarly within the knowledge of the carrier, and it alone could present them to the Commission. The probable effect upon other rates of the proposed change was, therefore, strictly matter of defense. That being true, it follows that a Federal Court of equity ought not to grant an injunction to relieve the carrier of the consequences of its deliberate failure to present the facts to the tribunal established by the State to pass upon them. It can not be assumed that the Railroad Commission would not have given to

those facts whatever weight this court may now think they ought to have.

Prentis v. Atlantic Coast Line Co., 211 U. S. 210.

While the order of the Commission is administrative or legislative and not judicial, yet the reason of the rule that one who has negligently failed to defend an action at law can not have an injunction to restrain the enforcement of a judgment against him resulting from that negligence applies here with much force.

In Creath's Adm'r. v. Sims, 5 How. 192, the court by Mr. Justice Daniel, after stating that a court of equity "will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence" said:

> "Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

In Hendrickson v. Hinchley 17 How. 443 the court by Mr. Justice Curtis said:

> "Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it."

The Railroad Commission is the tribunal established by the Kentucky Constitution to pass upon rate ques-

tions, and while it may be that the railroad company can not be required to anticipate just what rates the Commission will prescribe, and, therefore, be required to show to the Commission in advance that those rates would be confiscatory, yet where the Commission is asked to prescribe a certain rate, and it does so, the railroad company can not then have an injunction to restrain the enforcement of the rate prescribed upon the ground that other rates will be affected, unless it brought that fact to the attention of the Commission, or gives some excuse for not doing so. In any event, the carrier would not be wholly without remedy at law, and a court of equity ought not to relieve it against the consequences of its own negligence, especially as the Commission may revoke or modify its order at any time.

If it could be assumed that the facts relied on were presented to the Commission the finding of the Commission as to the effect of its order on other rates than those prescribed ought to be accepted as final and conclusive.

Of course, we do not concede that the mere fact that other rates might be affected, or might have to be changed, would furnish any reason why the rates prescribed should not be enforced.

IX.

The carrier can not complain that discrimination would result from the enforcement of the order of the Commission.

In addition to what we said in our original brief in regard to discrimination pp. 54-56 we would suggest that the appellant will not be heard to complain that other persons would be prejudicially affected by the rates prescribed.

In Interstate Commerce Commission v. Chicago R. I. & P. R. Co., 218 U. S. 88, in which a decree enjoining the enforcement of an order of the Interstate Commerce Commission reducing certain rates was reviewed, the court referring to the statement of the Commission that other rates were also too high, but that it would not reduce them because that was not the time to precipitate such a violent change as would follow such a reduction, and also to the objection made by the railroad companies to the order of the Commission on that account, the court by Mr. Justice McKenna said (109):

> "It is very clear that by a voluntary reduction by them of such rates, the equality of opportunity dependent upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to

a party who complains of a grievance which is not his."

Again, the court said (110):

> "The order of the Commission, besides, is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities, or areas of territory have grounds of complaint, the way is open by application to the Commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the Commission should first pass, and of which the courts should not be called upon in advance to intimate an opinion."

X.

The traffic regulated by the order of the Railroad Commission does not extend to or affect other States, and the regulation is, therefore, not a regulation of interstate commerce.

On page 13 of their reply brief counsel for appellant say:

> "It is evident that that part of commerce 'among' the States, both interstate and intrastate, which is carried on by interstate railroads is national in its character and demands uniformity of regulation, and that, therefore, Congress alone can legislate with respect to such traffic, and when Congress has not legislated it necessarily follows that such traffic is to be free from all legislation whatever."

Counsel thus boldly declare that Congress has exclusive power to regulate all the traffic of an interstate

railroad, both interstate and intrastate, brushing aside the many decisions of this court upholding the power of the States to regulate that traffic which is purely internal, even though carried on by a railroad engaged also in interstate traffic.

By a typographical error the word "and" was omitted from the quotation made from the case of "The Daniel Ball," 10 Wall 557, on page 67 of our original brief, and our attention was first called to the fact by the reply brief for appellant. We are inclined to think, however, that the omission of the word "and" does not materially change the meaning of the sentence. Of course, no commerce which is carried on wholly within the limits of a single State "extends to" other States. It is clear, therefore, that when the court said that the commerce clause excludes from Federal control "that commerce which is carried on entirely within the limits of the State, and does not extend to or affect other States," the court used the words "and does not extend to or affect other States" for the purpose of stating a quality which is possessed by all commerce carried on entirely within the limits of the State, and not as implying that there might be commerce carried on wholly within the limits of a State which might extend to other States. Of course, if the words "extend to" were not used as words of limitation the word "affect" was not used as a word of limitation. But the decision of this case will not turn upon the effect of the word "and" in that sentence. The court there held that an agency of interstate com-

merce was, as to that commerce, subject to Federal control although it operated wholly within the limits of a single State, and the effect of the regulation was not considered. The jurisdiction of Congress depended upon the nature of the commerce regulated. The commerce that is regulated by the order of the Kentucky Railroad Commission here involved undoubtedly neither extends to nor affects any other State than Kentucky. It is the nature of the commerce regulated, and not the effect of the rate prescribed, which determines whether the State or Congress has the power of regulation.

That commerce "among" the States within the meaning of the Commerce clause is only that commerce which crosses State lines was settled by the case of Gibbons v. Ogden, 9 Wheaton 195-6. In Wabash, etc., R. Co. v. Illinois, 118 U. S. 557 (573) the court by Mr. Justice Miller said:

> "The argument on this subject can never be better stated than it is by Chief Justice Marshall in Gibbons v. Odgen, 9 Wheat. 195-6. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States; and the power of Congress to regulate it exists wherever that commerce is found."

XI.

This court has repeatedly recognized the distinction between direct and indirect burdens upon interstate commerce as affecting the validity of State regulations.

On page 21 of their reply counsel for appellant say:

> "The argument which appellees make as to direct and indirect burdens merely amounts to saying that a State may do that indirectly which it is prohibited by the Constitution of the United States from doing directly. The mere statement of this absurdity refutes it. It is clear that where this court has referred to direct and indirect effects of State action in its decisions the word 'indirectly' has been used in the sense of 'incidentally,' or 'immaterially.'"

The distinction between direct and indirect burdens upon interstate commerce has been made so often by this court that it does not seem altogether respectful to the court to characterize that distinction as absurd. Counsel say that in all cases where the court has seemed to make that distinction the words "direct burdens" are to be taken as meaning "material burdens," and that the words "indirect burdens" are to be taken as meaning "immaterial burdens." Let us make these substitutions in the last sentence of the quotation made on page 72 of our original brief from the case of Pabst Brewing Co. v. Crenshaw, 198 U. S. 17.

In that case it was admitted that Congress by the Wilson Act had, in effect, surrendered to the State the power to regulate the sale of liquor while still in the

original packages in which it had come into the State, but the argument was that if the regulation made in the exercise of that power operated to affect interstate commerce it was void. The court said that if the power to regulate existed the effect which the exercise of that power might have upon interstate commerce could not take away the power, and that to uphold the proposition contended for "would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious working of our constitutional system has been made possible." The proposition there asserted was substantially that which is asserted here, the only difference being that the power of the State to regulate existed there because Congress had, in effect, surrendered that power to the State, while here the power of the State to regulate exists because it has never been surrendered by the State, and yet the court in that case said that the indirect effect upon interstate commerce of the exercise by the State of its exclusive power of regulation could not destroy the power. It is clear, therefore, that if the statement of the court in that connection that the harmonious working of our constitutional system has been made possible by the distinction between direct and indirect burdens upon interstate commerce be accepted as meaning that the harmonious working of our constitutional system has been made possible by the distinction between material and immaterial burdens upon interstate commerce, the argument of the court means nothing. The reasoning of the court inevitably leads to the conclusion that the

exclusive power of the State to regulate intrastate commerce can not be destroyed by the indirect effect which the exercise of that power may have upon interstate commerce.

It is unnecessary to refer again to the many cases in which the distinction between direct and indirect burdens has been recognized, but we ask the court to consider once more the cases of Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503, and Louisville & Nashville Railroad Co. v. Eubank, 184 Ky. 27, as illustrating clearly that distinction. In the former of those cases the court held that section 218 of the Kentucky Constitution prohibiting a carrier from charging more for a longer than for a shorter distance over the same line in the same direction affected interstate commerce only indirectly, and was therefore not in violation of the Commerce clause of the Federal Constitution. In that particular case the railroad company was punished for charging a higher rate on coal from Altamont to Lebanon than it charged to Louisville, all within the State of Kentucky. The company was, therefore, compelled to lower its rate to Lebanon or to increase its rate to Louisville, and we may assume that it increased its rate to Louisville. But when the rate to Louisville was increased that increase probably made necessary an increase in the interstate rate to New Albany, Indiana, and no doubt the probable necessity of such a change in the interstate rate was pressed upon the court as a reason why it should hold that the State law was a regulation of interstate commerce.

Again, let us suppose that when the law took effect appellant was maintaining lower rates from Louisville to Covington than it charged to Latonia, an intermediate point, and that the rate to Covington was increased to avoid the penalty of the law. Appellant says, however, that it maintains the same rates to and from Cincinnati that it maintains to and from Covington, and so the increase in the rate to Covington resulted in an increase of the rate to Cincinnati.

When we consider that the Kentucky long and short haul law applies to every railroad in Kentucky, and that conditions similar to those we have supposed may have existed on each one of those roads engaged in interstate traffic at every point on the border of the State, there is no escape from the conclusion that the burden which that law imposes is far greater than the burden which the regulation here complained of imposes upon interstate commerce, and yet this court held that as the burden was an indirect one the statute was not an unconstitutional regulation of interstate commerce. If, as counsel for appellant insist, the court meant that the burden was immaterial, it follows that the burden here is immaterial.

The suggestion that the court intended to hold in that case that it would determine in each case as it arises whether or not the statute, if applied to that state of facts, would materially burden interstate commerce, can hardly be seriously made. In L. & N. R. Co. v. Kentucky, 183 U. S. 503, a penalty was imposed upon the carrier for violating the law, and it is not conceivable

that the court intended to hold that the guilt of the carrier could depend upon what a court or jury might determine as to the effect of the statute upon interstate commerce appearing from the facts developed upon the trial. No such question was submitted to the jury in that case, or considered by the court. The law, if thus construed, would be void as an *ex post facto* law within the principles of the case of L. & N. R. Co. v. Commonwealth, 99 Ky. 132. Besides, the validity of each conviction under the statute would have to be finally determined by this court.

But counsel say that when the court came to consider the case of L. & N. R. Co. v. Eubank, 184 U. S. 27, it held the statute to be void to the extent that it regulated traffic which extended to or affected other States, and that is true. The court had held in L. & N. R. Co. v. Kentucky, 183 U. S. 503, that the statute applied only where the long haul and short haul were both wholly within the State of Kentucky, but when a Kentucky court held otherwise in the Eubank case this court held that the State law was void to the extent that it prohibited the carrier from discriminating in favor of the interstate shipper, and the reason given was that this was a direct burden upon interstate commerce, the law being a direct regulation of the rate to the longer distance point. The court, by Mr. Justice Peckham, said:

> "It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance)

from Nashville to Louisville, for a railroad carrier, that the State might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The State might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the State, than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it, the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists."

That case and the case of L. & N. R. Co. v. Kentucky, 183 U. S. 503, when considered together, illustrate very clearly the distinction between direct burdens and indirect burdens upon interstate commerce.

In Alabama & Vicksburg Railway Co. v. Railroad Commission of Mississippi, 203 U. S. 496, the court considered and upheld an order of the Mississippi Railroad Commission requiring the plaintiff in error to put in a certain flat rate on grain and grain products from Vicksburg to Meridian, that rate being then restricted by the carrier to shipments which had come to Vicksburg within ninety (90) days over the Vicksburg, Shreveport

& Pacific Railroad, and being given under the pretense of a "rebilling" arrangement. The court by Mr. Justice Brewer referring to the power of the State to enforce equality among its citizens said (501):

> "That a State has such power can not be doubted, and it can not be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the Company."

Again, the court said:

> "The State may insist upon equality as between all its citizens, and that equality can not be defeated in respect to any local shipments by arrangements made with or to favor outside companies."

The arrangement which the carrier had in force was made to encourage shipments into the State over a particular interstate railroad, and although the State regulation put an end to that arrangement, and to that extent affected interstate commerce, the court held that the State had the power to require equality as among its citizens although interstate commerce might be indirectly affected.

In support of their contention that a State regulation which even indirectly affects interstate commerce is void counsel for appellant cite the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1. In that case the court held that a statute of the State of Kansas, requiring a foreign telegraph company to pay as a "charter fee" a given per cent of its entire authorized capital stock as a condition of continuing to do local business in the

State, was invalid under the commerce clause of the Federal Constitution as amounting to a burden and tax on the company's interstate business.

The court held that the tax was a direct tax upon interstate commerce although it was imposed as a condition of doing local business. When it was determined that the tax was a tax upon interstate commerce, the purpose for which it was imposed was immaterial. The court did not hold that the tax was imposed upon intrastate business and was invalid because it affected interstate business, but held that it was imposed upon the interstate business of the telegraph company. As the power to tax means the power to destroy no taxation of interstate business by the State is permitted. The purpose of the tax is immaterial.

XII.

The power of the State to regulate intrastate traffic is not determined by the actual effect of the regulation as shown by the proof in each case as it arises.

The Railroad Commission either acted within the power conferred by the statute, or it exceeded that power. If it kept within the power granted its action is valid, provided the statute is valid, and if it exceeded the power granted its action is void. If the order of the Commission is held to be void because it is a regulation of interstate commerce, the real ground of the decision will be that the statute did not authorize the Commission to regulate interstate commerce. That the regu-

lation we have here was authorized by the terms of the statute can not be doubted. Is the statute, therefore, an unconstitutional regulation of interstate commerce because under it the Commission has the power to make such an order as that of which the carrier is here complaining? The question presented, therefore, is just that which was presented in L. & N. R. Co. v. Kentucky, 183 U. S. 503. The court in that case did not consider whether or not the statute if applied in that particular case would directly affect interstate commerce, but whether it would do so in any case to which it might by its terms apply, the facts of the particular case being considered, no doubt, as illustrating what might be done under the statute. The McChord Act, therefore, must be considered in the same way. The facts of this case illustrate what may be done under the statute, but they are to be considered only for that purpose. Just as the court in the case of L. & N. R. Co. v. Kentucky, *supra*, considered, as we may assume, that the carriers might be compelled to increase their rates to points on the border of the State, thus requiring them from considerations of business policy to increase rates to points just beyond the border, so the court here will consider that the Railroad Commission, under the McChord Act, may do that which the long and short haul law itself does, and will determine whether or not that fact causes the statute to be a direct regulation of interstate commerce. In L. & N. R. Co. v. Eubank, 184 U. S. 27, the court held that the long and short haul law was a direct regulation of the rate to the longer distance point, and so the long

and short haul law directly regulates the rate to every point within the State of Kentucky, since every point is a longer distance point with reference to some other point.

The court can not hold the McChord Act to be void as a regulation of interstate commerce without overruling a long line of cases in which similar statutes have been upheld, and so the argument is that the order of the Commission and not the statute is void. But the court, as shown in our original brief, pp. 106-107, has repeatedly held that statutes prescribing complete schedules of intrastate rates do not directly affect interstate commerce, and it follows, of course, that an order prescribing only a few intrastate rates does not directly affect interstate commerce.

If the Legislature had prescribed a schedule of rates would the court take up each rate separately and hear evidence as to its effect upon interstate rates, and then declare the statute to be a regulation of interstate commerce as to some rates and not a regulation of interstate commerce as to other rates? We hardly think so, and yet that is what would have to be done in such a case if the court should hold that the effect of each rate prescribed by the Commission as shown by the evidence is to determine whether or not the regulation of that rate is a regulation of interstate commerce.

Again, if the validity of each order prescribing a rate is to depend upon what the evidence shows as to its effect upon interstate commerce there can never be a penalty imposed for a violation of such an order of

the Commission as the provisions of the statute imposing penalties for its violation would be void for uncertainty, since the guilt of the carrier could not be made to depend upon what a court or jury might conclude from the evidence as to the effect of the order upon interstate commerce.

L. & N. R. Co. v. Commonwealth, 99 Ky. 132.

But if counsel for appellant are right in their contention that the intrastate traffic and the interstate traffic of an interstate railroad are so interwoven that any regulation of the intrastate traffic must be a regulation of the interstate traffic (Reply brief, p. 4) it is clear, without regard to the reasons already given, that the determination of the question as to whether or not a regulation of intrastate traffic is an unconstitutional regulation of interstate commerce can not depend upon the evidence in the particular case as to the effect of the regulation upon interstate commerce, as that is a matter of which the court must take judicial notice. It follows, therefore, that the various cases in which the court has upheld regulations of intrastate rates can not be distinguished upon the ground that the court did not then have before it any evidence showing that the regulation would materially burden interstate commerce, as the court must have taken judicial notice of the effect of the regulation upon interstate commerce.

XIII.

The power of Congress to regulate interstate commerce does not impair the power of the States to adopt regulations for the protection of their people.

In addition to the case of New York, etc., R. Co. v. State of New York 165 U. S. 628, and other cases cited in our original brief in support of this proposition we desire to call the attention of the court to the case of Chicago, etc., Railway Co. v. Arkansas, 219 U. S. 453, in which it was held that a statute of the State of Arkansas prescribing a minimum of three brakemen for freight trains of more than twenty-five cars operated in the State did not amount to an unconstitutional regulation of interstate commerce as applied to the interstate trains of a foreign railway company. In that case the court, by Mr. Justice Harlan, said:

> "It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits. Beyond doubt passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power granted to the general govern-

ment, or with some right secured by that instrument, or unless they are purely arbitrary in their nature."

The obligation of the State to protect its citizens against extortion is just as clear as its obligation to protect them from personal injury, and while the State has no power to protect its citizens against extortionate interstate rates for the reason that such power is vested exclusively in Congress, it must have the power to protect them against extortionate intrastate rates, especially when Congress has not attempted to do so. The claim that the State which has granted the power of eminent domain and other valuable privileges to a railroad corporation which it has created has no power to protect its citizens against the carrier's extortionate charges on intrastate traffic merely because the carrier has elected to engage also in interstate commerce, even though Congress while granting protection to interstate shippers refuses to protect intrastate shippers, is so completely refuted by all the adjudged cases bearing on the question that no further argument is needed for that purpose.

XIV.

The claim of a charter contract concedes the power of the State to regulate intrastate rates.

The claim set up in Paragraph XIX of the bill that the provisions of the railroad company's charter prescribing maximum rates constituted a contract with the State by which the company acquired the right to charge

those rates is an unqualified claim, and not a claim in the alternative. If the condition which the State attached to its grant amounted to a contract it must have been binding on both parties, and it could not be binding on either party unless the State, as between it and Congress, had power to regulate the intrastate rates of the carrier. That a State has the right to attach to a franchise which it grants to a railroad corporation the condition that the corporation shall not charge rates in excess of those prescribed in the charter of the corporation can not be doubted, and if the State grants such a franchise reserving the power of regulation, the regulation when subsequently made is just as effective as if it had originally been embraced in the charter. Leaving out of view the fact that the charter in question here was granted for an interstate railroad, it would be rather remarkable if the State could attach the condition to its grant that certain rates should not be exceeded, and the corporation yet be able to avoid that condition as to intrastate rates by electing to become also an interstate carrier. The power to regulate rates is not merely the power to reduce, and if Congress and not the State has the power of regulation that power can not be limited by any contract between the corporation and the State. It is not sufficient, therefore, to say that the powers granted by the State were a sufficient consideration for the undertaking of the corporation, even though the State may have had no power to regulate rates, for the undertaking of the corporation not to exceed the

rates prescribed was not binding on the corporation if Congress had the power of regulation.

In Howard v. Illinois Central R. Co., 207 U. S. 463, in which the first Employer's Liability Act passed by Congress was held to be unconstitutional, the court, by the present Chief Justice, said (502):

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which can not be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

It follows, therefore, that neither the State nor Congress can impose conditions as to that part of commerce

which it has no power to regulate, and that the power of the State to impose upon a railroad corporation which it creates the obligation not to charge intrastate rates in excess of those prescribed by the State implies the power of the State to regulate those rates. It seems to be conceded that the State had no power to impose any condition as to interstate rates because of the exclusive power of Congress over interstate commerce, and, therefore, the claim that the State *did* have power to impose conditions as to intrastate rates concedes complete power in the State to regulate those rates.

If it be said that the obligation of the corporation not to exceed the rates prescribed in the charter is binding until Congress interferes, the answer is that the power to prescribe maximum rates in the charter implies the power to reserve the right to subsequently prescribe such rates, and the regulation made under that power is binding until Congress acts, even if the power of Congress over intrastate rates be conceded. As shown in our original brief, pp. 82-83, Congress by the first section of the Act to regulate Commerce has expressly elected *not* to regulate intrastate rates, thus leaving in full force the power which the railroad company by its claim of a charter contract concedes to be in the State until Congress acts. The corporation concedes that its contract, if any exists, is repealable by the State, and not only the power of the State to make the contract as to intrastate rates but the power of the State to repeal the contract implies that the power to regulate those rates is in the State and not in Congress. Not only does

the power of the State to prescribe maximum intrastate rates in the charter of the corporation imply the power to regulate those rates, but the existence of that power is conclusive that the validity of the regulation can not depend upon its effect upon existing interstate rates.

XV.

Congress while regulating interstate rates has elected to leave to the States the regulation of intrastate rates, and thereby decided that there need not be uniformity of regulation.

As we have shown in our original brief, pp. 82-84, Congress, by Section One of the Act to Regulate Commerce, has expressly provided that the provisions of that Act shall not apply to the transportation of property "wholly within one State," and as the various States when that Act was last re-enacted had long regulated intrastate rates, that provision, of course, could mean nothing else than that the regulation of those rates was left to the several States. Assuming that Congress has jurisdiction over intrastate rates, we thus have a decision by Congress that it is not desirable that intrastate rates should be regulated uniformly with interstate rates. Whether or not Congress intends that a particular part of Commerce shall be left free from regulation is merely a matter of inference, and while the inaction of Congress in some cases may authorize the inference that Congress intended that there should be no regulation, in other cases, as said in Smith v. Alabama, 124

U. S. 465, the failure of Congress to legislate can only be construed as expressing its intention not to disturb the State regulation which exists. If Congress had any power over intrastate rates, which we deny, it is simply a question as to whether Congress intended to leave the regulation of those rates to the States or to leave them altogether unregulated, and the latter is inconceivable. To leave intrastate rates unregulated while interstate rates are strictly regulated by Congress would certainly not result in uniformity of regulation.

We ask that the judgment appealed from be affirmed.

Respectfully submitted,

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* GARRETT ET AL., CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 23. Argued April 4, 1912.—Decided December 1, 1913.

The same rule by which the Federal court has jurisdiction to determine all the questions, local as well as Federal, when a Federal question is raised by the bill, governs the application for preliminary injunction under the act of June 18, 1910, c. 309, 36 Stat. 539, 557.

Unless the case imperatively demands such a decision, this court is reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state

[1] Original docket title Louisville & Nashville Railroad Company *v.* Siler et al., constituting the Railroad Commission of Kentucky.

tribunals to which the question properly belongs. *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245.

Prescribing rates for the future is a legislative and not a judicial act.

In prescribing intrastate rates the legislature of a State may act directly or, in the absence of constitutional restriction, it may commit the authority to do so to a subordinate body; and *held* that the legislature of Kentucky by the act of March 10, 1900, properly authorized the Railroad Commission of that State under certain conditions to fix reasonable intrastate rates for railroad transportation in conformity with the provisions of the constitution of the State.

The legislature may determine what are reasonable rates either directly or through a subordinate body and use methods like those of judicial tribunals to elicit facts without invading the province of the judiciary. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

In this case it does not appear that the State Railroad Commission acted in an arbitrary manner in fixing intrastate railroad rates; nor was it necessary to give legality to its order as to particular rates established to require a reduction in other rates.

Failure in a state statute establishing a railroad commission and giving it authority to fix reasonable rates to provide for an appeal from orders of the commission does not deny the carrier right of access to the courts to review an order that fixes rates so unreasonably low as to be confiscatory and is not an unconstitutional denial of due process of law under the Fourteenth Amendment.

Presumably the State, as well as the Federal, courts are open to a carrier to test the constitutionality of an order made by a railroad commission and to obtain protection by bill in equity against its enforcement if unconstitutional. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265.

Penalties which are so unreasonable and severe as to be an unconstitutional denial of due process of law will not render a rate statute unconstitutional if they are separable, as in this case.

The right of the carrier to make its own intrastate rates is subject to the constitutionally enacted law of the State; in the absence of a legislative rate courts apply the common law in passing upon the reasonableness of the rates, but after legislative rates have been established the courts apply those rates unless there are constitutional objections.

So long as the legislature acts within its proper sphere, courts cannot substitute their judgment with respect to reasonableness of the established rates.

While a State may permit appeals to the courts from the rate making

orders of its railroad commission, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, failure to provide for such an appeal does not deny the carrier due process of law as guaranteed by the Fourteenth Amendment.

Loss in revenue generally follows reductions in rates but that does not necessarily prove that the reduced rates are confiscatory; there must be further proof that they do not allow a fair return for service rendered.

An order of the Railroad Commission of Kentucky made under the act of March 10, 1900, is a legislative act under delegated power and has the same force as if made by the legislature and is for this reason a law passed by the State within the meaning of the contract clause of the Federal Constitution.

A charter provision is not violated under the contract clause by a subsequent state law otherwise legal, if, prior to the enactment of the latter, the chartered corporation has subjected itself to the operation of an amendment to the state constitution reserving the power to alter, amend and repeal charters and franchises.

Minnesota Rate Cases, 230 U. S. 352, followed to the effect that the establishment of railroad rates wholly intrastate by a State Railroad Commission is not an unwarrantable interference with, or a regulation of, interstate commerce.

In an equity suit by a carrier against the members of a State Railroad Commission to restrain enforcement of a rate order under a statute which provided for awards of reparation for failure to comply with the order, the court should not pass upon the validity of any of such awards made to parties not before the court.

186 Fed. Rep. 176, affirmed.

THE facts, which involve the constitutionality under the constitution of Kentucky and also under the Constitution of the United States of the State Railroad Commission Statute of Kentucky and the legality of orders made by the Commission, are stated in the opinion.

Mr. Henry L. Stone and *Mr. Albert S. Brandeis*, with whom *Mr. William G. Dearing* and *Mr. William A. Colston* were on the brief, for appellant.

Mr. Edward W. Hines and *Mr. James Garnett*, Attorney General of the State of Kentucky, with whom *Mr. Charles*

C. McChord, *Mr. J. Van Norman*, *Mr. James Breathitt*, former Attorney General of the State of Kentucky, and *Mr. John F. Lockett* were on the brief, for appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from an order denying a motion for an interlocutory injunction. *Louisville and Nashville Railroad Co.* v. *Siler*, 186 Fed. Rep. 176. The motion was heard by three judges, and the appeal is taken under § 17 of the act of June 18, 1910, c. 309, 36 Stat. 539, 557.

The suit was brought by the Louisville and Nashville Railroad Company, a corporation organized under the laws of Kentucky, to enjoin the enforcement of two orders made by the Railroad Commission of that State on August 10, 1910. One of these orders prescribed maximum freight rates for certain intrastate traffic, that is, for the transportation of corn, rye, barley, malt, empty barrels, boxes, etc., from three points of origin, Louisville, Covington and Newport, to sixteen points of destination in Kentucky. The second order awarded specified amounts in reparation for payments previously made to the carrier for such transportation in excess of the rates found to be reasonable.

For many years the Railroad Company had given special rates to the owners of distilleries along its lines in Kentucky for the transportation of the commodities above mentioned, which constituted their raw materials and supplies. These rates were withdrawn on March 25, 1910, and what are described as the standard rates of the company, that is, those which had theretofore been charged to others than distillers, were substituted. Thereupon, numerous distillery companies complained to the Railroad Commission of the State, insisting that the new rates were exorbitant and that the former rates were just

and reasonable. After hearing, the Commission sustained the contention of the petitioners and fixed the maximum rates in question. These rates were the same as the special rates which, prior to March 25, 1910, the Railroad Company had given to the distillery companies; but, by the Commission's order, the rates as fixed were made applicable to the transportation between the points stated, of the described commodities without distinction as to persons or as to the use to be made of the commodities by the consignees.

The statute under which the Commission acted, in establishing these rates, is that of March 10, 1900, known as the McChord Act (Kentucky Statutes, § 820a, Carroll's edition, 1909).[1] It provides in substance that when complaint shall be made to the Railroad Commission, accusing any railroad company of charging extortionate rates, or when the Commission shall receive information or have reason to believe that such rates are being charged, it shall be its duty "to hear and determine the matter as speedily as possible." The Commissioners are to give the company complained of not less than ten days' notice, stating the time and place of hearing and the nature of the complaint or matter to be investigated. They "shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been, guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered." The rate so fixed is to be entered as an order on the record book of the Commission; a copy thereof is to be mailed to a representative of the railroad company

[1] This statute is set forth in full in *McChord* v. *L. & N. R. R. Co.*, 183 U. S. 483, 484, 485; and in *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175, 178-180.

affected, and it is to be "in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record." If the railroad company, or any officer, agent or employé thereof charges a greater rate for like services thereafter, "said company . . . and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offence in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction in any sum not less than two thousand dollars nor more than five thousand dollars." The Circuit Court, in the appropriate counties as prescribed by the statute, is to have jurisdiction of such prosecutions, which are to be by indictment.

The bill attacked the statute, and the action of the Commission, as violative of the rights secured to the complainant by the Federal Constitution. Objections were also made under the constitution and statutes of the State. Demurrers were filed but upon these no decision was made. The motion for preliminary injunction was heard upon bill and affidavits. In denying the motion, the court did not pass upon the validity of the second order as it was of the opinion that those in whose favor the award of reparation had been made were "necessary parties in interest;" these had not been brought in. 186 Fed. Rep. 176, 203.

First. The order fixing rates.

Because of the Federal questions raised by the bill the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an

appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its "unconstitutionality." The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here. They may be first considered.

1. It is objected that the act of March 10, 1900, violates §§ 27, 28, 109 and 135 of the state constitution [1] by under-

[1] The provisions referred to are as follows:

"SECTION 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"SECTION 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

"SECTION 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"SECTION 135. No Courts save those provided for in this Constitution, shall be established."

taking to confer judicial powers upon the Commission. By these sections, provision is explicitly made for three distinct departments of government; the judicial power of the Commonwealth is vested in the courts established by the constitution, and no judicial power can be exercised by any other officer except those thus named unless authorized by some other provision of that instrument. *Roberts* v. *Hackney*, 109 Kentucky, 265, 268; *Pratt* v. *Breckinridge*, 112 Kentucky, 1.

So far as we are advised, the Court of Appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a state statute to be in conflict with the constitution of the State before that question has been considered by the state tribunals—to which it properly belongs—unless the case imperatively demands such a decision. *Pelton* v. *National Bank*, 101 U. S. 143, 144; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245, 291. Here, the argument against the statute is not of that compelling character.

It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, 495; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 336; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 394; *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 19; *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, 211 U. S. 282, 291; *Grand Trunk Rwy. Co.* v. *Railroad Commission of Indiana*, 221

U. S. 400, 403. The Railroad Commission of Kentucky was established by § 209 of the Constitution (adopted in the year 1891) which provided that "the powers and duties of the Railroad Commissioners shall be regulated by law" and that "until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners;" and by § 218 of the same instrument (the long and short haul provision) the Commission was authorized "in special cases, after investigation" to permit a less charge for longer than for shorter distances and to "prescribe the extent" to which the common carrier might be "relieved from the operations" of the section. *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 106 Kentucky, 633; 183 U. S. 503. It is unnecessary to review the statutes defining the powers of the then existing Commission, to which § 209 refers (General Statutes of Kentucky, ed. 1888, pp. 1021 *et seq.;* Act of March 7, 1890; I Acts, 1889–90, p. 25). For, while the former Commission had not been authorized to fix rates, it can hardly be doubted that the constitution, in providing that the powers and duties of the new Commission should be regulated by law, contemplated that it should be available as an appropriate instrument in the supervision and regulation of railroads and left the legislature free to adopt, if it saw fit, a practice already familiar (*Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495, 496) and to call this agency to its aid in prescribing reasonable intrastate rates. This authority the legislature granted by the act of March 10, 1900, empowering the Commission where, as in this case, particular rates were found to be exorbitant, to fix the reasonable rates thereafter to be charged. (*Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, 197.)

The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to "hear such statements, arguments or evidence offered by the parties" as it may deem relevant; and, it is in case it determines that the carrier is "guilty of extortion" that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily—even without the express command of the statute—would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is "the nature of the final act" that determines "the nature of the previous inquiry." *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227.

It is also urged in support of the objection that the order of the Commission is to be "in full force and effect" at the expiration of ten days after notice, and that this is the equivalent of a declaration that the order shall be final and conclusive, but the finality of the act did not change its essential character. So far as it was final, unless revoked or modified by the Commission, it was final as a legislative act within the Commission's authority.

2. It is contended that the Commission acted arbitrarily. We are referred to the allegations of the bill that there was "no testimony" before the Commission "that did establish or that tended to establish" the unjust or unreasonable nature of any of the rates maintained by the appellant; that there was "no evidence" introduced in the investigation or considered by the Commission "showing or tending to show" that the appellant's rates were "in and of themselves unjust, unreasonable or extortionate"; that the evidence "had no proper relation" to the reasonableness of rates for transporting the commodities in question when they were to be used for distillery purposes; and that "no evidence whatsoever was adduced at the hearing and investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged" for the transportation described in the Commission's order.

But it appears that upon receiving the complaint of the distillers with respect to the rates which the appellant had put into effect, the Commission set the matter for hearing; that the parties were heard; that each party produced a number of witnesses; and that the appellant, represented by counsel, was permitted to cross-examine the witnesses of the complainants. The rates as fixed by the Commission were the same as those which for many years had been maintained by the appellant for the distillers' supplies. The evidence taken by the Commission was not before the court below; and the general allegations of

the bill, which in substance stated the judgment of the pleader as to what such evidence did not "establish" or "tend to establish," and the statements contained in the affidavits submitted upon the application for injunction, were utterly insufficient to justify the court in enjoining the rates upon the ground that the Commission either had denied the hearing which the statute contemplated or by its arbitrary action had been guilty of an abuse of power.

It is also charged, invoking a doctrine analogous to that declared in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, that the Commission assumed a power which it did not possess by proceeding upon the theory of a supposed equitable estoppel in favor of the distillers because they had been induced to erect and extend their plants upon the faith of the former rates. This contention finds no support in the record. The Commission purported to act under its statutory authority, and, finding the rates charged by the carrier to be extortionate, fixed other rates which they declared to be reasonable.

Again, it is further said that the enforcement of the rate order should have been enjoined in order to prevent unjust discriminations and undue preferences in contravention of §§ 817 and 818 of the Kentucky statutes. Section 817 prohibits unjust discrimination in charges, as between persons, for like and contemporaneous service in transportation. Section 818 makes it unlawful to give any undue or unreasonable preference or advantage to one person or locality as compared with another. Section 819 prescribes penalties for violation, the prosecution to be by indictment. The point of this objection is that obedience to the Commission's order with respect to the traffic from the three places of origin to the sixteen places of destination therein mentioned will bring about discrimination in intrastate rates, contrary to these statutes, as against thirty-two other distillery stations on the lines

of the appellant, the distillers at which, so far as appears, have not complained of the appellant's rates.

In view of the decision in *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 20 Ky. Law Rep. 491, to the effect that the provisions of § 818 are too uncertain to support a criminal proceeding under § 819, it is not contended by the appellant that it would be subject to the prescribed penalties so far as § 818 is concerned. And it is urged by the Attorney General of the State, on behalf of the appellees, that § 817 does not apply to discrimination as between localities.

But, aside from these considerations, we find the objection to be without merit. The Commission dealt with the question before it, and, on complaint as to the rates to the sixteen points of destination, ordered what it found to be reasonable rates for that transportation. In so doing, it acted in conformity with the statute. To give legality to its order as to the particular rates in question, it was not necessary for the Commission to require a reduction in other rates. Certainly, the fact that the other rates described, which had not yet been passed upon by the Commission, might likewise be open to the objection of unreasonableness and that their maintenance by the appellant might lead to unjust discrimination, would furnish no basis for restraining the enforcement of the Commission's order if that order were otherwise valid.

3. The order is further attacked upon the ground that the statute under which it was made operates to deprive the carrier of its property without due process of law and to deny to it the equal protection of the laws contrary to the Fourteenth Amendment.

It is insisted that the failure to provide for an appeal to any court from the final order of the Commission, or for a judicial review of the reasonableness of the prescribed rates before they become effective, makes the statute

void. But the statute does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry. We have not been referred to any decision of the state court holding that the statute should be so construed (*Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 456). If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 459, 460; *St. Louis & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 649, 659, 666; *Ex parte Young*, 209 U. S. 123, 166. Presumably, the courts of the State, as well as the Federal courts, would be open to the carrier for this purpose (*Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 278) without express statutory provision to that effect. In answer to the present objection, it is sufficient to say that there is no showing here of an attempt to preclude such resort to the courts, or to deny to the carrier the assertion of its rights, unless it can be found in the severity of the penalties attached to disobedience of the order. And, if it were assumed that these would be open to objection as operating to deprive the carrier of a fair opportunity to contest the validity of the Commission's action, still, the penal provisions would be separable, and the force of the remaining portion of the statute would not be impaired. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53, 54; *Granada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; *The Minnesota Rate Cases*, 230 U. S. 352, 380; *Southern Pacific Co.* v. *Campbell*, 230 U. S. 537, 553.

4. The appellant, however, submits a broader contention which concerns the scope of the review to which it is entitled in this suit and the nature of the judicial function

where rates fixed by the legislature, or under its direction, are assailed as unreasonable.

It is urged that so long as a carrier's existing rates are just and reasonable for the services it performs, it is within its constitutional and statutory rights; that what constitutes a just and reasonable rate for the services it has performed is a question of fact upon which the carrier is entitled to a judicial hearing; that even more clearly is it entitled to such a hearing, if, as a consequence of a decision by the Commission that it has exceeded the limits of just and reasonable compensation for past services, it "must forfeit in favor of such statutory body its rate-making power and be deprived of that property right with respect to 'like services thereafter rendered' as provided in the McChord Act." It is said, further, that under the statute the finding from the evidence that the carrier has charged more than a reasonable compensation is "the essential jurisdictional fact" which must exist before the Commission can fix rates, and it is insisted that, if upon a judicial investigation and the evidence adduced by the parties, it turns out that this jurisdictional fact did not exist, then the Commission's entire action must be regarded as null and void, without regard to the question whether the new rates prescribed by it, in such circumstances, are reasonable or unreasonable, compensatory or confiscatory. It is therefore contended that the appellant is now entitled to a judicial hearing upon the questions of fact as to the reasonableness of the particular rates existing at the time the order was made as well as of those fixed by the Commission; and that in this view the injunction asked for should have been granted.

These arguments are elaborated and earnestly pressed, but the questions presented have been so frequently dealt with by this court that an extended discussion is unnecessary. The right of the carrier to make its own intrastate rates is subject to the law of the State con-

stitutionally enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing, the courts apply the common law. But it is the province of the legislature to make the law; and when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been trangressed. The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power. It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted, and a determination by the Commission whether the existing rates were excessive. But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be reëxamined by the courts. The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 331;

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397–399; *Smyth* v. *Ames*, 169 U. S. 466, 526; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8, 17; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; *The Minnesota Rate Cases*, 230 U. S. 352, 433, 434. Undoubtedly, a State may permit appeals to its courts from the rate-making orders of its railroad commission and, upon the review of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, or even to act legislatively (*Prentis* v. *Atlantic Coast Line, supra*). But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority.

5. With respect to the question of confiscation, the Circuit Court ruled that the bill did not "clearly tender an issue that could be said to involve confiscatory rates." The court also referred in its opinion to the statement in the brief of complainant's counsel that the complainant was not bound in this case "to allege or prove that the new rates were confiscatory" and also to an oral disclaimer of a purpose to rely upon any such contention. "This concession," the court said, "we think, was but natural, in view of the history of the rates which the railroad company voluntarily maintained for years prior to March 25, 1910, as before pointed out. No averment is made touching the proportions in volume of distillers' traffic and of non-distillers' traffic, and it could not be assumed that the company had been carrying distillers' supplies and products at confiscatory rates, nor that the extension of those rates to all similar traffic on the lines in question would amount to the confiscation of property." 186 Fed. Rep. 176, 191.

It is explained by the appellant that what was conceded

below was that the bill as amended did not aver that the rates fixed by the Commission would result in the confiscation of appellant's property on its entire intrastate business, but that it is insisted, and was insisted below, that the rates would not yield a fair or reasonable compensation for the services performed, and would deprive the company of the fair and reasonable return which it is entitled to earn upon the property devoted to such services, with respect to the described traffic.

Without passing upon the general propositions advanced in argument, it suffices to say that we are of the opinion that the bill as amended wholly failed to make a case entitling the appellant to the relief sought. Apart from the merely general averments, it is alleged that the rates fixed by the order would cause an annual loss in revenue on intrastate freight of at least $15,600, and also that, in consequence of the effect on interstate rates, there would be an additional annual loss of not less than $3,000; further, that if the carrier were compelled to put in similar rates to the thirty-two other distillery stations, there would be a loss of $54,000 a year on shipments to those places; and that there would be other losses to an amount not specified, on shipments to consignees other than distillers.

But it may be supposed that, other conditions being the same, a reduction in rates found to be excessive will cause a loss in revenue; and the question is not simply as to the amount of reduction but whether the rates as fixed would allow a fair return. The bill does not show the value of the property employed, the expenses of operation, or the return which would be permitted under the rates prescribed.

6. It is further objected that the rate-making order impairs the obligation of the contract contained in the company's charter in violation of § 10, Article I of the Federal Constitution. It is alleged in the amended bill that by its charter granted by the act approved March 5,

1850, and the amendments thereto, the appellant was authorized to charge specified maximum rates for transportation over its lines, and that the rates fixed by the Commission's order are less than those which it was thus empowered to maintain.

It is provided by section three of the Bill of Rights contained in the state constitution adopted in 1891, that "every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment." Section 190 of this constitution is as follows: "No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

It is set forth in the amended bill that, by resolution of the board of directors of the appellant, adopted July 11, 1902, it "duly accepted the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891, and the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto," and that a copy of this resolution was filed with the Secretary of the State of Kentucky. Chapter 32 of the general statutes is the chapter upon private corporations. One of its provisions, contained in § 573, is that the "provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897. . . . After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions

would be applicable to them if organized under this chapter." By another provision of this chapter, in the article relating to railroads (§ 816), a railroad corporation charging more than a just and reasonable rate of compensation is guilty of extortion; the penalty was a fine provided for in § 819. In *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Kentucky, 132, the Court of Appeals, holding that § 816 was too indefinite, to be sustained as a penal statute, concluded its opinion by saying: "It may be observed further, however, that it would seem singular if such a statute, even in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law."

It was after the decision in this case that the act of March 10, 1900, was passed, empowering the Railroad Commission to fix rates.

The amended bill states that, upon the filing of the resolution accepting the provisions of the Constitution, and the provisions of chapter 32 of the general statutes, "thereby and thereafter the said contract (with respect to the maximum freight and passenger rates it is entitled to charge and collect on its said lines of railroad) between complainant and the Commonwealth of Kentucky became and is now no longer irrevocable or irrepealable"; but, it is averred that "nevertheless, said contract remains intact and has never been revoked or repealed by any act of the Legislature," and that its obligation was in full force and effect at the time the rate order was made (August 10, 1910). That is, it is insisted that § 573 of the statutes, above quoted, is not applicable for the reason that on April 5, 1893, when the statute, of which this provision was a part, was approved, and also on Septem-

ber 28, 1897, when the repeal provided for in that statute was to take effect, the appellant's charter was not subject to repeal or amendment and that it did not become so subject until 1902. It is also contended that the act authorizing the Commission to fix rates does not apply because that was passed two years before the appellant filed its resolution; in other words, that its contract contained in its charter is still in force because the legislature has not enacted a repealing or amending provision since the resolution was filed.

We do not find it necessary to review all the questions that are suggested. Apart from other considerations, it is manifest that the statute of March 10, 1900, was a continuing authority to the Railroad Commission. The order of the Railroad Commission in fixing rates was a legislative act, under its delegated power. It had "the same force as if made by the legislature." *Grand Trunk Ry. Co.* v. *Indiana Railroad Commission*, 221 U. S. 400, 403. It is for this reason that it is a "law" passed by the State, within the meaning of the contract clause. *New Orleans Water Works Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 590; *Grand Trunk Ry. Co.* v. *Indiana Railroad Commission, supra; Ross* v. *Oregon*, 227 U. S. 150, 163. As it had full legislative effect, the appellant could not assert against its operation the provision of a contract which had previously become subject to legislative alteration. (*Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 274, 275.) Upon the filing of the resolution, the charter provision as to the maximum rates therein specified ceased to be an obstacle, if it had been such before, to the exercise by the State of its rate-making power.

7. The remaining questions require only a brief mention. The penalty provisions of the statute in question are challenged upon the ground that they violate the

provisions of the Fourteenth Amendment. But, as already stated, these provisions are separable. It is also objected that the order of the Commission constitutes an unwarrantable interference with, and a regulation of, interstate commerce. The questions thus raised cannot be distinguished from those which were considered and decided in *The Minnesota Rate Cases*, 230 U. S. 352.

Second. The order for reparation.

This order was not made under the statute of March 10, 1900, authorizing the Commission to fix rates. It is conceded on behalf of the appellees that if the Commission was not authorized by § 821 or 829 of the Kentucky statutes to award reparation, it had no authority whatever for that purpose. Section 821 provides that it shall be the duty of the Railroad Commissioners to see that the laws relating to railroads are faithfully executed and to exercise a general supervision over the railroads of the State. Section 829 authorizes the Commission to "hear and determine complaints" under §§ 816, 817 and 818, to the provisions of which we have already referred. It provides that such complaints shall be in writing, that the company complained of shall have notice of hearing, that the Commission shall hear and reduce to writing all the evidence adduced and that it shall render such award as may be proper. If the award be not satisfied within ten days, the chairman of the Commission is to file a copy of it and the evidence heard, in the office of the clerk of the proper circuit court, whereupon it is to be docketed for trial and summons is to be issued, as in other cases, requiring the party against whom the award has been made to show cause why it should not be satisfied. If the party fails to appear, judgment is to be rendered by default, and, if a trial is demanded, the case is to be tried as other ordinary cases, except that no evidence is to be introduced by either party save that heard before the Commission, unless the court shall be satisfied by sworn testimony that

it could not have been produced before the Commission by the exercise of reasonable diligence.

It thus appears that the two proceedings, though they were conducted at the same time, were distinct in their nature. The one resulted in a legislative rule for the future; in the other, there was an award of specific sums of money to particular persons upon the basis of past transactions and this award, according to the provisions of the statute, on being filed could be enforced by proceedings in the courts of the State. The persons in whose favor the award was made were not parties to the suit, and we think that the court was right in declining to determine its validity.

The order denying the application for injunction is

Affirmed.